Nos. 82-1186, 82-1465

In The

Supreme Court of the United States

October Term, 1983

TRANS WORLD AIRLINES, INC., *Petitioner,*

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED, *Respondents.*

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED, *Petitioners,*

v.

TRANS WORLD AIRLINES, INC., *Respondent.*

On Writs of Certiorari To The United States Court of Appeals For The Second Circuit

JOINT APPENDIX

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August 29, 1983

PETITION FOR CERTIORARI IN No. 82-1186 FILED JANUARY 15, 1983;
PETITION FOR CERTIORARI IN No. 82-1465 FILED MARCH 1, 1983.
CERTIORARI GRANTED IN BOTH No. 82-1186 AND No. 82-1465 JUNE 13, 1983.

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DOCKET ENTRIES

United States District Court
For the Southern District of New York

Date	NR	Proceedings
03/20/81	1	Filed complaint, issued summons and notice purs. to 28 USC 636(c).
03/23/81	2	Filed amended complaint.
04/6/81	3	Filed summons w/Marshals ret-Svd-Trans-World Airlines by cert. mail with return receipt signed by John (illegible) on 3/31/81. Attys for deft.
04/6/81	4	Filed addtl summons w/Marshals ret-Svd-Trans-World Airlines by cert. mail with return receipt signed by John M. . . . . on 3/31/81. Attys for deft.

Date	NR	Proceedings
04/22/81	5	Filed Stip & Order ext time for deft to answer to 5/20/81. KNAPP, J.
05/20/81	6	Filed ANSWER to amended complaint.
06/30/81		PRE-TRIAL CONFERENCE HELD BY WK.
07/01/81	7	Filed Stip & Order deft shall have to 7/31/81 to file a motion for partial S/J. Oral argument shall be heard on 10/16/81. KNAPP, J.
07/31/81	8	Filed deft.'s notice of motion for partial summary judgment ret: 10/16/81.
07/31/81	9	Filed memo of law in support of deft.'s motion for partial summary judgment.
09/1/81	10	Filed memo of law in opp. to deft.'s motion for partial summary judgment.
09/1/81	11	Filed affdvt of John R. Foster in opp. to deft.'s motion for partial S/J.
09/14/81	12	Filed affdvt of W. H. Clarke in support of TWA's motion for partial S/J.
09/14/81	13	Filed reply memo of law in support of deft.'s motion for partial S/J.
10/5/81	14	Filed supplemental memo of law in opp. to deft.'s motion for partial S/J.
10/5/81	15	Filed affdvt of J. R. Foster in opp to motion for partial S/J.
11/12/81	16	Filed MEMORANDUM & ORDER . . . Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would effect direct that judgment be entered for plaintiff in the amount of $6,475.98 plus interest and costs, a result which would per-

Date	NR	Proceedings
		mit immediate appeal from this order. Knapp, J. mailed copies.
12/14/81	17	Filed notice of motion for an order purs to Rule 59(e) of FRCP amending the Court's Order and Judgment of 12/3/81, noticed for 1/8/82.
12/14/81	18	Filed pltff's memo in support of their motion for an amended judgment.
12/16/81		Filed Memo End on doc. #17—Motion Denied. KNAPP, J.
12/23/81	19	Filed Order amending the 2nd paragraph of our Memo & Order dtd 11/6/81 to read, "Article 22 of the Warsaw convention provides that, unless a special declaration of value is made at the time of a delivery, a carriers liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram". KNAPP, J. CSC
12/4/81	20	Filed Order & Judgment #81,1379--final judgment entered for pltffs in the amount of $6,475.98 plus interest and costs. KNAPP, J. JUDGMENT ENTERED—12/4/81 Raymond F. Burghardt Clerk
12/30/81	21	Filed notice of appeal to the USCA fr the final judgment entered in this action on 12/4/81. Copies mailed to Curtis Mallet-Prevost Colt & Mosle.
1/4/82		Copies of notice of appeal and district court docket entries on behalf of Franklin Mint Corporation, et al. filed. (fees paid)
1/5/82		Appellants Franklin, et al. Form C filed, pfs.
1/5/82		Appellants Franklin, et al. Form D filed, pfs.
1/20/82		Civil Appeal Scheduling Order #1 filed, P.C.

Date	NR	Proceedings
1/26/82		Record on appeal (original papers of district court) filed.
2/4/82		Scheduling Order #2 filed.
2/25/82		Appellants Franklin Mint Corporation, et al. motion for admission of attorney PRO HAC VICE filed, pfs.
2/26/82		Appellants Franklin Mint Corporation, et al. brief filed, pfs.
2/26/82		Appellants Franklin Mint Corporation, et al. joint appendix filed, pfs.
2/26/82		Appellants Franklin Mint Corporation, et al. addendum to brief filed, pfs.
3/1/82		Appellee-Respondent of U.S.C.A. #82-8018 motion for consolidation of appeals in 82-8018 and 82-7012 filed, pfs. (filed in 82-8018)
3/2/82		Appellants Franklin Mint, et al. affidavit in opposition to motion to consolidate filed, pfs. (filed in 82-7012)
3/2/82		Answer to the petition of plaintiff Robles for permission to cross-appeal filed, pfs. (filed in 82-8018)
3/2/82		Order granted appellants Franklin Mint, et al. motion for admission of attorney John Foster pro hac vice filed. (endorsed on motion filed 2/25/82) (Clerk)
3/4/82		Order denied, appellees motion for consolidation of appeals in 82-7012 & 82-8018. If the petition to appeal is granted in docket 82-8018, that appeal may be submitted to the same panel which hears 82-7012, but only if time and circumstances permit. (endorsed on motion filed 3/1/82) (LWP). (filed in 82-8018)

Date	NR	Proceedings
3/4/82		Amicus Curiae Roulin & Harley motion for enlargement of time to file amicus brief filed, pfs.
3/4/82		Amicus Curiae Roulin & Harley motion for leave to intervene as amicus curiae filed, pfs.
3/4/82		Amicus Curiae Roulin & Harley amicus curiae brief *received*, pfs.
3/8/82		Order denied amicus curiae motion for enlargement of time to file brief filed (endorsed on motion of 3/4/82) (LWP).
3/8/82		Order denied amicus curiae Roulin & Harley motion for leave to intervene as amicus curiae filed (endorsed on motion of 3/4/82) (LWP).
3/22/82		Amicus Curiae Roulin & Harley motion for review by Court of denial of motion to file as amicus Brief, pfs. filed.
3/26/82		Appellee TWA brief filed, pfs.
3/26/82		Appellee TWA addendum to brief filed, pfs.
3/31/82		Order granted motion for review by court of denial of motion to file as Amicus Curiae Roulin & Harley (endorsed on motion of 3/22/82) filed. (IRK, WRM, RJC) ("The brief may be filed but the panel hearing this case will decide whether oral argument is necessary")
3/31/82		Amicus Curiae Roulin & Harley amicus brief filed, pfs.
04/12/82		Appellant Franklin Mint, et al. reply brief filed [w/pfs.] [by mail].
4/22/82		Case argued before: Oakes, Cardamone, Winter, CJJ.

9/28/82	Judgment affirmed by published, signed opinion, Winter.
9/28/82	Judgment filed.
10/12/82	Appellee TWA petition for rehearing with a suggestion for rehearing en banc, pfs, filed.
11/09/82	Movant International Air Transport Association motion for leave to file an amicus brief in support of Appellee's Petition for Rehearing en banc filed (w/pfs.) (see order dated 11-10-82).
11/10/82	Order granted, movant Air Transport Association motion for leave to file an amicus brief and permission to file brief out of time in support of Appellee's Petition for Rehearing filed (FXG for JLO).
11/10/82	Movant Air Transport Amicus Brief in support of Petition for rehearing filed (w/pfs.).
12/1/82	Order denying appellee TWA petition for a rehearing with a suggestion for rehearing en banc, filed.
12/7/82	Appellee TWA motion to stay the issuance of the mandate filed (w/pfs.) (see order filed 12-17-82).
12/17/82	Order granted appellee TWA motion for stay of mandate filed (JLO, RJC, RK).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

AMENDED COMPLAINT

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs,

- against -

TRANS WORLD AIRLINES, INC.,

Defendant.

PLAINTIFFS DEMAND A JURY TRIAL ON ALL ISSUES

Plaintiffs, Franklin Mint Corporation (hereinafter "Franklin"), Franklin Mint Limited (hereinafter "Limited"), and McGregor, Swire Air Services Limited (hereinafter ("MSAS"), by their attorneys, Waesche, Sheinbaum & O'Regan, complaining of the defendant, Trans World Airlines, Inc. (hereinafter "TWA"), allege as follows:

JURISDICTION AND VENUE

(1) Franklin is, and has been at all times pertinent hereto, a corporation duly organized and existing pursuant to the laws of the Commonwealth of Pennsylvania and with its principal place of business in the Commonwealth of Pennsylvania.

(2) Limited is, and has been at all times pertinent hereto, a corporation duly organized and existing pur-

suant to the laws of England and with its principal place of business in England.

(3) MSAS is, and has been at all times pertinent hereto, a corporation duly organized and existing pursuant to the laws of England and with its principal place of business in England.

(4) Upon information and belief, TWA is, and has been at all times pertinent hereto, a corporation duly organized and existing pursuant to the laws of the State of Delaware; with its principal place of business in the State of Missouri; and with a place of business within this District at 605 Third Avenue, New York, New York.

(5) This action arises under a treaty of the United States, specifically, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter "the Convention"), 49 Stat. 3000, T.S. No. 876, which was concluded on October 12, 1929, and which was adhered to by the United States on June 27, 1934.

(6) The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

(7) This Court has jurisdiction of this action under the provisions of 28 U.S.C. §§ 1331(a) and 1332(a).

AS AND FOR A CAUSE OF ACTION AGAINST TWA

(8) On or about March 24, 1979, in the City of Philadelphia, Commonwealth of Pennsylvania, there was shipped

by Franklin, and delivered to TWA, as a common carrier, four (4) packages of numismatic articles, all in good order and condition.

(9) Under its air waybill no. 015-6618-8776, TWA accepted said shipment which was delivered to it and, in consideration of certain agreed freight charges thereupon paid or agreed to be paid, agreed to transport and carry the said shipment to MSAS and Limited, London Heathrow Airport, Middlesex, England, and there deliver the same in like good order and condition as when received by TWA.

(10) Thereafter, in violation of its duty as a common carrier of merchandise by air for hire, its agreement with Franklin, MSAS, and Limited, and its obligations under the Convention, TWA permitted the said shipment to be lost or stolen while in the exclusive care, custody, and control of TWA and its duly authorized agents; and, as a direct result thereof, the said shipment was never delivered at the place of destination.

(11) Franklin is the consignor and MSAS and Limited are the consignees of the shipment described above and bring this action on their own behalf and, as agent and trustee, on behalf of and for the interest of all parties who are, or may become, interested in said shipment and the loss thereof as their respective interests may ultimately appear, and plaintiffs are entitled to maintain this action.

(12) By reason of the aforesaid, plaintiffs have sustained damages in the amount of $250,000.00, no part of which has been paid although duly demanded.

WHEREFORE, plaintiffs demand judgment against TWA:

(a) for the sum of $250,000.00;

(b) for interest from March 24, 1979;

(c) for the costs and disbursements of this action; and

(d) for such other, and further, relief as to this Court seems just and proper.

Dated: New York, New York
March 23, 1981.

Waesche, Sheinbaum & O'Regan
Attorneys for Plaintiff
By: /s/ Lou P. Sheinbaum
A Member of the Firm

Office and P. O. Address:
120 Broadway, Suite 1825
New York, New York 10271
(212) 227-3550

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

ANSWER TO AMENDED COMPLAINT

Defendant, Trans World Airlines, Inc. ("TWA"), by its attorneys, Curtis, Mallet-Prevost, Colt & Mosle, for its answer to the amended complaint:

WITH RESPECT TO JURISDICTION AND VENUE

1. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs "1," "2," and "3."

2. Denies the averments in paragraph "4," except states that TWA is a Delaware corporation with a place of business in this district at 605 Third Avenue, New York, New York.

3. Denies the averments in paragraph "5" insofar as those averments assert that this action is properly brought; however states that this action purports to be brought under the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention").

4. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs "6" and "7", except states that plaintiffs purport to invoke the federal question and diversity jurisdiction of this Court.

WITH RESPECT TO THE FIRST CAUSE OF ACTION

5. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs "8" and "9," except states that on or about March 23, 1979, TWA accepted a shipment of four (4) packages in Philadelphia, Pennsylvania under waybill no. 015-6618-8776 for delivery to McGregor, Swire Air Services Limited at London Heathrow Airport, England, for Franklin Mint Limited.

6. Denies the averments in paragraph "10," except states that the shipment was never delivered.

7. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph "11."

8. Denies the averments in paragraph "12."

FIRST AFFIRMATIVE DEFENSE

9. The liability of TWA, if any, is limited in accordance with its tariffs filed with the Civil Aeronautics Board.

SECOND AFFIRMATIVE DEFENSE

10. The shipment referred to in the complaint was "international transportation" as defined in Article 1 of the Warsaw Convention and TWA claims all the defenses available to it under the applicable provisions of that Convention including a monetary limit of liability of $20 per kilogram.

THIRD AFFIRMATIVE DEFENSE

11. Pursuant to Article 20 of the Warsaw Convention, TWA took all necessary measures to avoid the damage alleged in the complaint or it was impossible for it to take such measures. Therefore, TWA is not liable to plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

12. Plaintiffs' causes of action are barred by the two year limitations period of Article 29 of the Warsaw Convention.

FIFTH AFFIRMATIVE DEFENSE

13. The damage claimed, if any, was caused by or contributed to by plaintiffs' negligence.

SIXTH AFFIRMATIVE DEFENSE

14. Through their conduct, plaintiffs assumed the risk of any loss.

WHEREFORE, defendant Trans World Airlines, Inc. requests judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated: New York, New York

May 19, 1981

Curtis, Mallet-Prevost, Colt & Mosle

By /s/ Robert S. Lipton
A Member of the Firm
Attorneys for Defendant
Trans World Airlines, Inc.
100 Wall Street
New York, NY 10005
(212) 248-8111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

STIPULATION AND PRE-MOTION ORDER

WHEREAS, Counsel for all parties in this action appeared before the Court at a pre-motion conference on June 30, 1981:

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, Counsel for the parties hereto, that defendant shall have until July 31, 1981 to serve and file a motion for partial summary judgment together with papers in support thereof; plaintiffs shall have until August 31, 1981 to serve and file papers in opposition to said motion; defendant shall have until September 14, 1981 to serve and file reply papers; and plaintiffs shall have until September 28, 1981 to serve and file supplemental papers.

Oral argument on the motion shall be heard at 2 p.m. s/wk on October 16, 1981.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that the following facts are not in dispute:

1. Plaintiff Franklin Mint Corporation ("Franklin") is a corporation organized and existing pursuant to the laws of Pennsylvania with its principal place of business there. It is engaged in business as a dealer in numismatic articles.

2. Plaintiff Franklin Mint Limited ("Limited") is a corporation organized and existing pursuant to the laws of England and with its principal place of business there. It is engaged in business as a dealer in numismatic articles.

3. Plaintiff McGregor, Swire Air Services Limited ("MSAS") is a corporation organized and existing pursuant to the laws of England and with its principal place of business there. It is engaged in business as a freight agent.

4. Defendant Trans World Airlines, Inc. ("TWA") is a Delaware corporation with a principal place of business in New York. It is engaged in business as, among other things, a carrier by air of cargo.

5. On March 23, 1979, in Philadelphia, Pennsylvania, Franklin, as shipper, delivered to TWA as common carrier, four packages said to contain:

"1 COS: METAL STAMPING DIES
METAL STAMPINGS NUMISMATIC
ARTICLES OF ADORNMENT
3 CTN: METAL STAMPINGS NUMISMATIC."

6. The total weight of the four packages was 714 lbs., and the total freight charge was $544.96.

7. The total value of the four packages was in excess of $6,500.00.

8. Franklin made no special declaration of value for carriage at the time of delivery to TWA of the four packages.

9. TWA accepted this shipment of four packages for delivery to MSAS at London Heathrow Airport, England, for Limited.

10. TWA accepted this shipment under its air waybill no. 015-6618-8776.

11. The shipment of four packages was lost or stolen and never delivered to destination.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that the following legal conclusions are not in dispute:

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air ["the Warsaw Convention"], 49 Stat. 3000, T.S. No. 876, governs the legal relations of the parties because the carriage involved was "international transportation" as defined in Article 1 of the Warsaw Convention.

2. TWA is liable for the loss of the four packages in accordance with Article 18 of the Warsaw Convention, subject to a limitation of such liability in accordance with Article 22 of the Warsaw Convention.

3. No other basis for liability nor other basis for defense is applicable to this action. The sole issue to be

determined in this motion is the maximum amount of TWA's liability, exclusive of interest and costs, pursuant to Article 22 of the Warsaw Convention.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that in the event the Court determines that the maximum amount of TWA's liability in this action is in excess of $6,500.00, plus interest and costs, the issue of the actual quantum of plaintiffs' damages will be determined in accordance with the pre-trial, trial, and post-trial provisions of the Federal Rules of Civil Procedure.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that defendant's motion for partial summary judgment shall be based upon this order.

Waesche, Sheinbaum & O'Regan

By /s/ Lou P. Sheinbaum
A Member of the Firm
Attorneys for Plaintiffs
120 Broadway, Suite 1825
New York, NY 10271
(212) 227-3550

Curtis, Mallet-Prevost, Colt & Mosle

By /s/ Robert S. Lipton
A Member of the Firm
Attorneys for Defendant
100 Wall Street
New York, NY 10005
(212) 248-8111

SO ORDERED 6/30/81

s/
Whitman Knapp
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Stipulation and Pre-Trial Order dated June 30, 1981, the Affidavit of Clive Douglas Bull sworn to July 27, 1981, the Affidavit of John N. Romans sworn to July 29, 1981 (the "Romans Affidavit"), and all the prior pleadings and proceedings had in this action, the undersigned will move this Court before the Honorable Whitman Knapp, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on October 16, 1981 at 2:00 P.M. or as soon thereafter as counsel may be heard, for an order granting Defendant Trans World Airlines, Inc. ("TWA") partial summary judgment limiting TWA's maximum liability in this action in accordance with the limitation of liability expressed in Article 22 of the Warsaw Convention converted into U. S. dollars by means of Special Drawing Rights and for such alternative and further relief as this Court deems just and proper;

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, TWA will rely on certain foreign statutes, case law, and legal materials, copies and certified translations of which are annexed as Exhibits to the Romans Affidavit.

Dated: New York, New York
July 31, 1981

Curtis, Mallet-Prevost, Colt & Mosle
By /s/ Robert S. Lipton
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TO: Waesche, Sheinbaum & O'Regan
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New York, New York 10271
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

AFFIDAVIT

State of New York, County of New York, ss.:

CLIVE DOUGLAS BULL, being duly sworn deposes and says:

1. I am Assistant Professor of Economics in the Department of Economics of New York University specializing in monetary theory and international economics. I received my Bachelors Degree with First Class Honors in Politics, Philosophy, and Economics, from Oxford University, England. Thereafter, I received my Doctorate in Economics from the University of California at Los Angeles. Prior to joining the faculty of New York University, I was lecturer with the Department of Economics at the California State University at Northridge.

2. I have been requested by Curtis, Mallet-Prevost, Colt & Mosle, counsel to the defendant herein, to indicate my opinion as to the comparative stability in the value of gold and Special Drawing Rights. That opinion, as well as the premises upon which it is based, is detailed below.

3. Although gold was once a monetary unit, it is now simply a commodity. It has no official monetary value and is freely traded in the United States and, indeed, in many other countries in the same manner as any other commodity, such as wheat, silver, soybeans or pork bellies. As such it can be expected to fluctuate widely in value from time to time due to normal market forces of supply and demand as well as to a wide variety of political developments. For example, recent political unrest, such as the invasion of Afghanistan, the holding of American hostages in Iran and the Iranian-Iraqi war, have all contributed to a wide fluctuation in the value of gold.

4. Prior to its demonetization, the role of gold was redefined to meet changing conditions. An international gold exchange system developed following the First World War. This system, under which sterling and the dollar were tied to gold, was set up and maintained in the 1920s (when the Warsaw Convention was drafted) by collaboration between the United States Federal Reserve Board, the Bank of England, and other European central banks.

5. In 1944, an international monetary system was created to provide financial stability in international markets. The basic tenets of this system were developed at the Bretton Woods Conference, and were subsequently embodied in the Articles of Agreement of the International Monetary Fund ("IMF"). Affiliated with the United

Nations, the IMF was organized to promote international monetary cooperation, facilitate the expanded and balanced growth of international trade, promote exchange stability and to help establish a multilateral system of payments for currency transactions among member States. Thus, the overall aim of the IMF is to minimize imbalances in the international balance of payments of any of its members and to tide them over temporary deficits. As originally conceived, a member with a balance of payments deficit could borrow foreign currency from the IMF in exchange for its own currency; it was then obligated to repurchase that currency within three or five years with gold or some other currency acceptable to the IMF. Under that system, the par value of most nations' currencies was fixed and expressed directly in terms of gold, or indirectly in terms of the U. S. dollar which itself was expressed in terms of gold. Thus, a nation's central bank would agree to use its gold and foreign exchange reserves in settlement of its foreign exchange obligations at a set par value. For example, for many years the United States agreed to buy or sell gold to the monetary authority of any nation at the rate of 0.888671 gram of gold per dollar or $35 per ounce.

6. However, by the 1960's it became apparent that, for a variety of reasons, the monetary system created by the Bretton Woods Agreement was breaking down. The world's, and especially the United States', gold reserves could no longer support the international monetary system. First, the total of world gold reserves was unable to keep pace with total world economic activity: in 1958, the ratio of world gold reserves to the volume of imports stood at about 57 percent; by 1967 the ratio declined to 37

percent. Second, an increasing proportion of the world's reserves—over 40 percent in 1967— was held in the form of foreign exchange, nearly all of it in the form of United States dollars and British pounds. Third, the gold component of reserves depended in large part on production decisions in South Africa, on industrial uses, and on purchases by hoarders and speculators. None of these factors bore any rational relation to the needs of the world economy; together, they resulted in inadequate and declining amounts of gold available for reserves.

7. In 1968, in response to the problems discussed above, a "two tier" system was created. The major trading nations decided that they would no longer buy and sell their gold on the commodity markets to stabilize its price. Instead, official transactions concerning balance of payments would be undertaken at the then official price of gold, $35 per ounce. Non-official transactions, such as the purchase of gold for jewelry, would be made on the commodity markets at a price which would be allowed to fluctuate according to the conditions of supply and demand and which in fact after 1970 diverged substantially from the official price of gold. As discussed below, the two-tier system with its differing official price and commodity price remained in effect until April 1, 1978.

8. During the 1960's a number of economists proposed that the international financial community create a wholly new asset which would have no competing uses as a commodity. In September 1967, the Board of Governors of the IMF approved the concept of the creation of Special Drawing Rights ("SDRs"). Under the IMF plan, a "Special Drawing Account" was established to facilitate

transactions among members, and SDRs became a supplement to existing reserve assets. Countries were allocated a number of SDRs, and a country having a balance of payments deficit could use them to settle its accounts by selling them to a country designated by the IMF. Designated countries are obligated to take SDRs and to provide convertible currency in return. Transactions are consummated simply by crediting and debiting the appropriate SDR account with the IMF.

9. SDRs were initially valued in terms of gold with one SDR equal to 0.888671 gram of fine gold—precisely equal to one U. S. dollar at its rate of $35 per ounce. By 1975, however, in an attempt to ameliorate severe economic pressures resulting from instability in the commodity price of gold, the IMF developed a plan, the Jamaica Accords, to abolish the official price of gold, to delete most references to gold in its Articles of Agreement; and to replace the official role of gold with SDRs. That plan became effective on April 1, 1978 when the SDR/gold link was severed for almost all practical purposes. Thereafter, gold was no longer used by the IMF's membership as an international unit of account. Instead, the IMF's members undertook to collaborate with the IMF and with each other to make the SDR the principal reserve asset in the international monetary system as well as the principal international unit of account, thereby making SDRs a complete substitute for gold.

10. After the demonetization of gold, SDRs were valued on a weighted average of a "basket of 16 currencies." That average was weighted roughly in proportion to the exports of goods and services of the various countries.

On January 1, 1981, the "basket" was reduced to five currencies: the U. S. dollar, the Deutsche mark, the Japanese yen, the French franc, and the British Pound sterling. The daily valuation of the SDR as determined by the IMF is published in financial newspapers including the *Wall Street Journal.*

11. SDRs have no competing use as a commodity as did gold. They are thus insulated from free market speculation and other problems which led to instability in the price of gold and its ultimate breakdown as an international unit of account.

12. As it is a weighted average of the values of several currencies, it would be expected that the SDR would be relatively stable in value; and this, in fact, has been the case. Moreover, as discussed below, this is especially so when compared to the wide fluctuation in the commodity price of gold.

13. The facts set forth in the prior paragraphs concerning the relative stability in value of SDRs as opposed to the wide fluctuations in value of gold are illustrated in several graphs annexed as Exhibits to this Affidavit. *Exhibit A* is a graph and article from *The New York Times* of January 30, 1981, page D-1, column 4, relating to the value of gold between November 1979 and January 1981, which I have independently reviewed and verified to be correct. I substantiated *The New York Times* data by reviewing the average monthly price of one ounce of fine gold in *International Financial Statistics* published by the IMF. While *The New York Times* graph indicates daily fluctuations, and while the data from *International Financial Statistics* lists monthly averages, I have compared

the information and in my opinion the graph in the *Times* is accurate.

14. *Exhibit A* demonstrates the extraordinary fluctuations in the value of gold between November 1979 and January 1981. Indeed, as this graph illustrates, during January 1981 alone, the price of gold fell from approximately $600.00 per ounce on January 5, 1981 to $493.75 per ounce on January 29, 1981, a fluctuation of 18 percent in the 24 day period. Previously, the price of gold fell from approximately $850 per ounce in January 1980 to approximately $490 per ounce in April of that year only to rise to about $700 per ounce in September 1980.

15. *Exhibit B* hereto is a graph which I myself prepared on the basis of data contained in "Gold Prices Table From 1944 to 1977" by Timothy Green, published by the Gold Information Center, and from *International Financial Statistics*. This graph illustrates fluctuations in the average market price of gold from 1929, the year the Warsaw Convention came into effect, to 1980. As this graph demonstrates, the price of gold was virtually stable in value from 1929 to 1970. However, with the elimination of stabilization of the price of gold by the world monetary powers, the value of gold began to fluctuate substantially. By 1974, for example, while the official price of gold was $42.22 per ounce, the commodity price had risen to $200 per ounce.

16. I have also prepared a graph comparing the fluctuation in value of gold to the fluctuation in value of SDRs for the period November 1979 to date. This graph is annexed hereto as *Exhibit C*. It clearly demonstrates that SDRs have been relatively stable in value during this

period while gold has fluctuated significantly. The data upon which this graph is based was also taken from the *International Financial Statistics* and is annexed hereto in tabular form as *Exhibit D.*

17. In sum the fluctuations in the commodity price of gold are extreme. Thus, not only the SDR but virtually all national currencies, including the French franc, the Deutsche mark, and the Swiss franc are far more stable. Indeed, the stability of the SDR *vis-a-vis* the commodity price of gold is quite dramatic. During the period November 1979 to date, the value of SDRs was highest during July 1980 ($624.83) and lowest in April 1981 ($569.62) for a difference of 10 percent. During the same period, however, the gold fluctuations were over 7 times as great. Thus, gold fluctuated from $391.99 in November 1979 to $675.31 in January 1980, a fluctuation of 72 percent.

/s/ Clive D. Bull
Clive Douglas Bull

(Jurat dated July 27, 1981, omitted in printing)

EXHIBIT A—NEW YORK TIMES ARTICLE AND GRAPH OF JANUARY 30, 1981 ANNEXED TO AFFIDAVIT OF CLIVE DOUGLAS BULL

New York Times, January 30, 1981, p. D-1, col. 4

GOLD BELOW $500 IN LONDON

By Youssef M. Ibrahim

Special to The New York Times

LONDON, Jan. 29—The price of gold fell as low as $485 an ounce here today—its first move below $500 in

more than nine months. In later New York trading, however, gold for February delivery rose $8.80 on the Commodity Exchange Inc. to $515.80 an ounce, and the Republic National Bank quoted it at $513 an ounce, up $8.

The decline in Europe came amid a general feeling among brokers that their clients are deserting gold. Apparently investors are attracted by high interest rates in the United States and are losing interest in gold as a hedge against uncertainty because global political tensions seem to be easing.

The rebound in New York was attributed to fresh fears of unrest in Poland, following a warning on the Polish state radio that the Government "will have to take the necessary decisions to assure the normal functioning of plants and enterprises in accordance with the best social interests" if the present wave of labor disputes continues.

Gold closed on the London bullion market today at $493.75 an ounce, down almost $31 for the day. Some dealers predicted the price would go as low as $400 an ounce over the next few weeks. The dollar rose sharply in relation to other major currencies.

"Last year's events—the invasion of Afghanistan, the holding of the American hostages, the Iranian-Iraqi war and the rising price of oil—have so distorted the market that people were carried away," a major British gold dealer said in an interview. "The way gold went up was totally out of proportion. What we are beginning to see is a return toward a more rational price, one that is much closer to reality."

The new price is far lower than the $720 an ounce reached last September when the war between Iraq and Iran began, with its threat to the world's supply of oil. The record price of gold was $850 an ounce, reached in January 1980.

Economists in London argued today that the most important factor in moderating the price of gold was high interest rates in the United States. Money market funds, now a popular investment vehicle, are yielding above 17 percent.

"It's an indication that people want to put their money into money rather than some noninterest-bearing commodity," said Robert Perlman, chairman of the London-based Forex Research, a foreign-exchange consulting concern.

Recent political developments also have been reassuring to investors who in uncertain times might seek a hedge in gold ownership.

Easing of Anxiety Cited

"The continued anxiety over the hostage crisis was the one factor that was moderating the fall in gold prices for a while," commented one London gold analyst. "Now that this is over, the prices are falling."

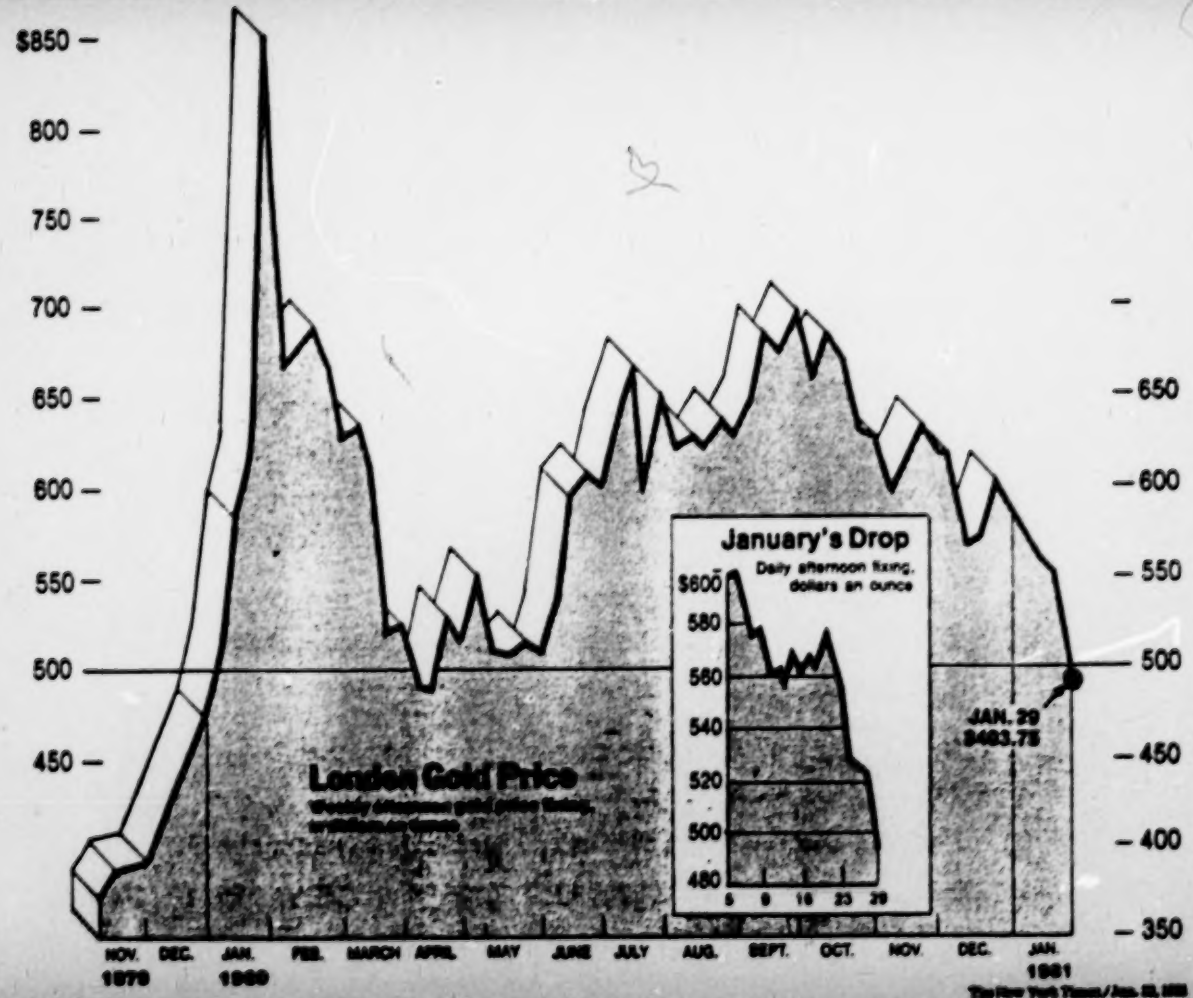
The price of gold has dropped more than $70 an ounce since Jan. 20, when the American hostages, held in Iran for 444 days, were released and President Reagan was inaugurated.

Mr. Reagan's assumption of office, analysts in London say, has also given conservative investors an increased sense of confidence in the American economy. They cited

his pledges to trim the budget and follow a tight monetary policy.

With the price of gold falling, one analyst suggested that producers of gold such as South Africa might step up their mining and increase their supply. This could help keep the price from rising again soon.

Part of the price decline has also been attributed to what a number of dealers said was a slowing of demand for gold in industrial use and in the manufacture of jewelry around the world. Demand has been discouraged by the worldwide recession and the recent high price of the metal.


$850
800
750
700
650
600
550
500
450
650
600
550
500
450
400
350
London Gold Price
January's Drop
Daily afternoon fixing, dollars an ounce
$600
580
560
540
520
500
480
5
9
16
23
29
JAN. 29
$483.75
NOV. 1979
DEC.
JAN. 1980
FEB.
MARCH
APRIL
MAY
JUNE
JULY
AUG.
SEPT.
OCT.
NOV.
DEC.
JAN. 1981

JA20

EXHIBIT B—GRAPH ANNEXED TO AFFIDAVIT OF CLIVE DOUGLAS BULL

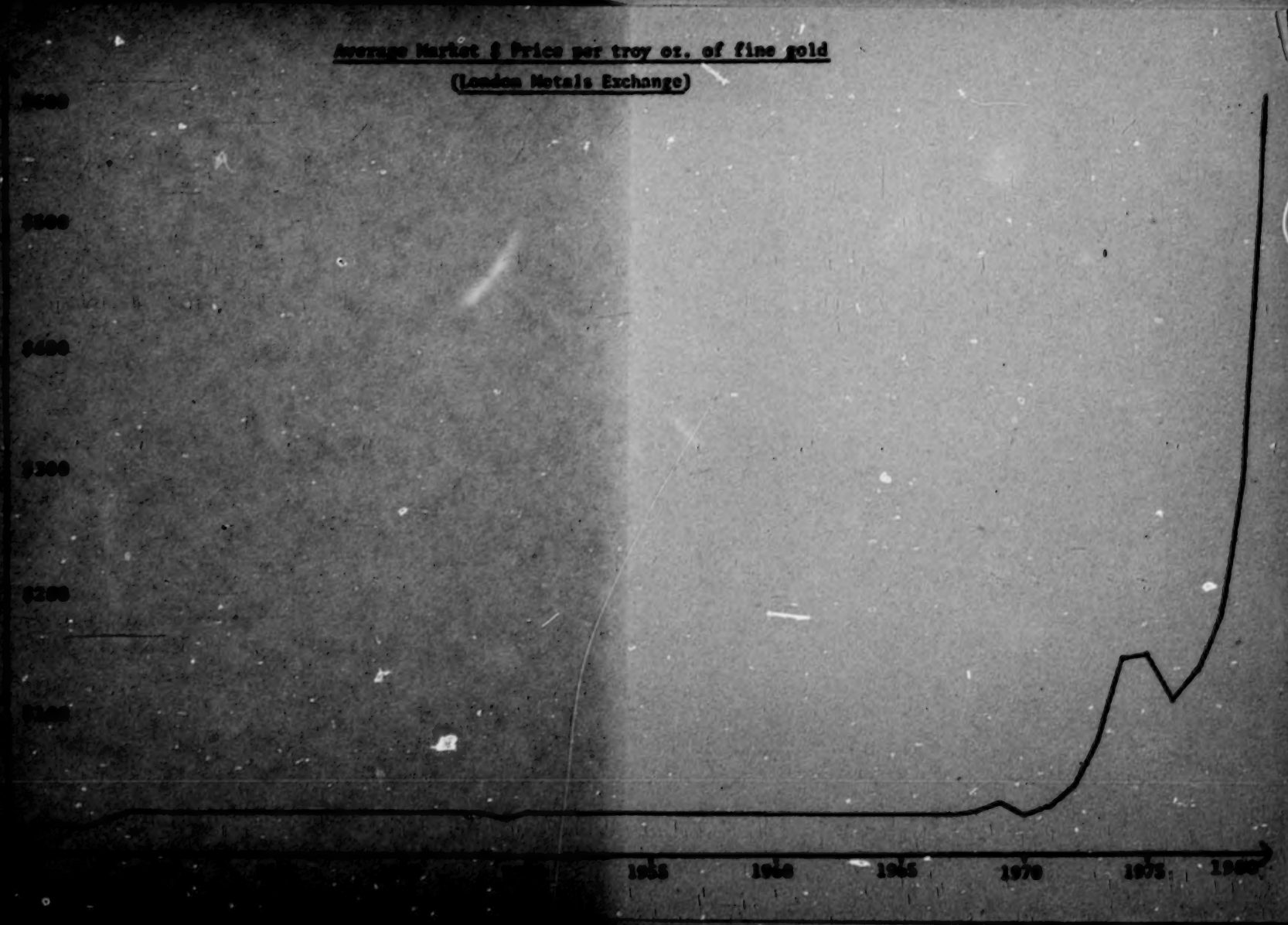


EXHIBIT C—GRAPH ANNEXED TO AFFIDAVIT OF CLIVE DOUGLAS BULL

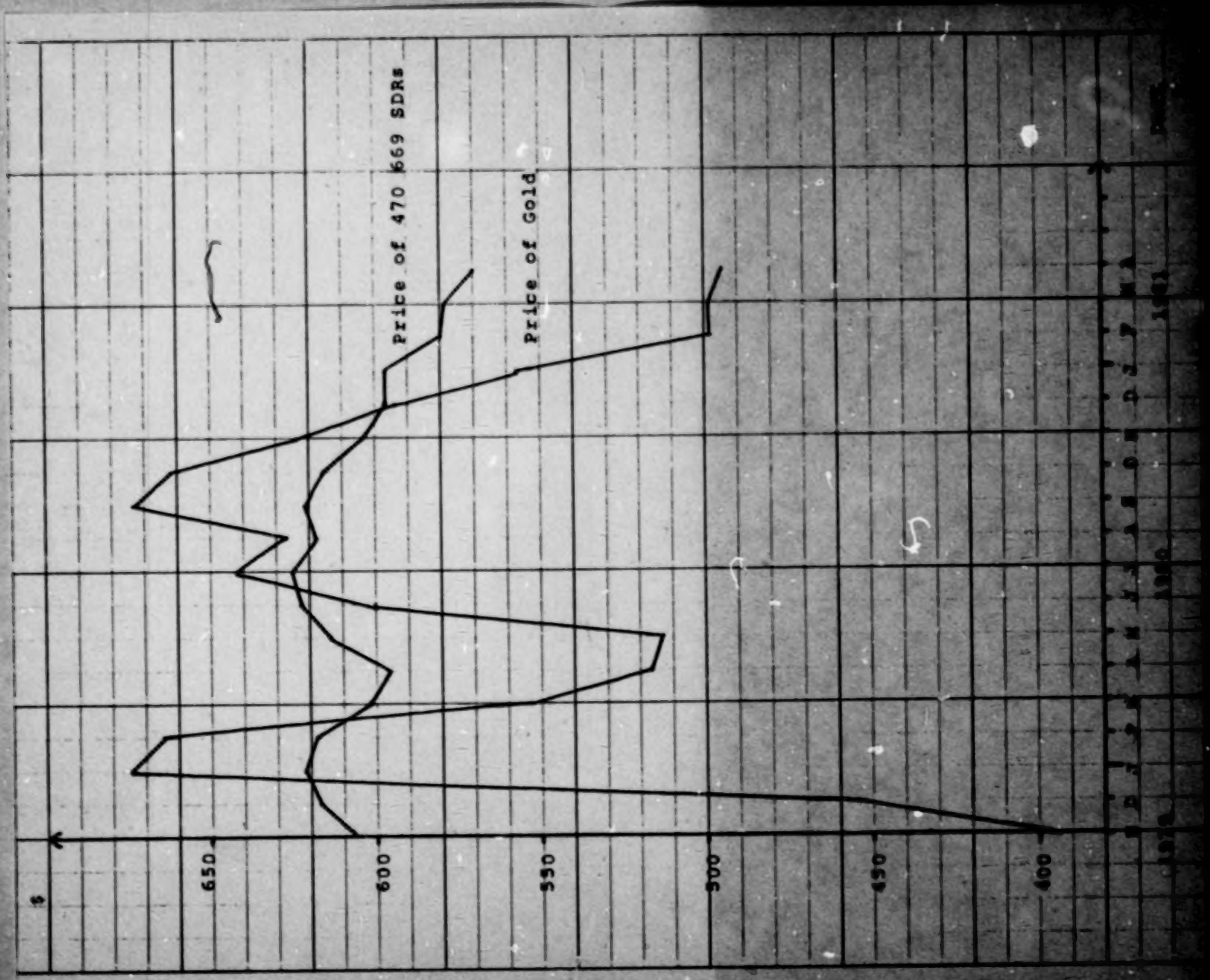


EXHIBIT D—TABLE ANNEXED TO AFFIDAVIT OF CLIVE DOUGLAS BULL

Date	$ price of 1 oz. fine gold[1]	$ per SDR[1]	$ Value of 470.699[2] SDRs
November 1979	391.99	1.29	608.98
December	455.08	1.31	617.57
January 1980	675.31	1.32	621.45
February	665.32	1.31	618.02
March	553.58	1.28	601.11
April	517.41	1.27	596.47
May	513.82	1.30	613.99
June	600.72	1.32	621.52
July	643.27	1.33	624.83
August	627.15	1.31	618.07
September	673.63	1.32	620.51
October	661.15	1.31	615.75
November	624.77	1.28	603.86
December	594.92	1.27	596.46
January 1981	557.39	1.27	596.77
February	499.76	1.23	579.98
March	498.76	1.23	578.14
April	495.80	1.21	569.62

Notes

1. All data from *International Financial Statistics*, I. M. F., various issues.

2. 470.699 SDRs is the average 1980 $ price of gold converted into SDRs at the 1980 average $/SDR exchange rate.

EXHIBIT B—C. A. B. STAFF MEMORANDUM OF MAY 20, 1981 ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

FOR INFORMATION

CIVIL AERONAUTICS BOARD

MEMORANDUM

May 20, 1981

TO: The Board

FROM: Director, Bureau of Compliance and Consumer Protection

CC: Director, Bureau of International Aviation
Director, Bureau of Domestic Aviation
General Counsel

SUBJECT: Warsaw Convention Liability Limits

For more than a year now, various components of the Board's staff have been considering the question of how the liability limitations contained in the Warsaw Convention should be converted to dollars. The question is a troublesome one, and the memoranda exchanged among the staff have not reached the same conclusions of this issue.[1] There is considerable interest in the final resolution of this matter among parties outside the Board, including some involved in litigation where the amount of potential liability is a significant issue.

The Board has never taken a position as to which liability limitation level is correct, and the Bureau of Compliance and Consumer Protection recommends that the Board decline to take any position which would affect the determination of liability limits until the matter has been fur-

[1] This Bureau wrote the first memorandum in March . . . 1980. BIA and BDA wrote reply memos in April . . . 1980.

ther refined at the staff level. Any policy recommendation that would come from the staff should be communicated to the Departments of Transportation and State as well in the hope of reaching interagency agreement. This memorandum contains BCCP's reappraisal of the problem and is intended to initiate a fresh start in addressing the question at the Board.

I. Background.

The Warsaw Convention was signed at Warsaw, Poland, on October 12, 1929, and ratified by the United States Senate on July 31, 1934.[1a] Among its most compelling purposes were the protection of the fledgling aviation industry from potentially ruinous damage judgments and the assurance of some reliable and consistent basis for recovery for injury or damage to persons or property.[2] Thus the Convention (a) enunciated carriers' liability for personal injuries (Article 17), damage or loss of baggage and other property (Article 18), and damage due to delay (Article 19) subject to affirmative defenses which could be proved by a carrier, *i. e.*, the carrier's freedom from fault (Article 20) or the injured person's contributory fault (Article 21); (b) provided a limitation on the extent of liability (Article 22); and (c) nullified any provision tending to relieve a carrier of any such liability or to fix a lower limit (Article 23). In addition, the Convention required carriers to provide notice to

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[1a] 49 Stat. 3000.

[2] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-500 (1967). See also Horner & Legrez, Minutes, Second International Conference on Private Aeronautical Law, Warsaw 1929 (Fred B. Rothman & Co. 1975), pp. 38, 40-41.

the passengers in the form of a ticket or baggage check with respect to, *inter alia*, the limitations on liability, and barred defenses permitted by the Convention, including the limitation of liability, if carriers accept passengers or baggage without delivering the required ticket or baggage check (Articles 3 and 4).

The Board has implemented Articles 3 and 4 by specifying the notice carriers must provide concerning the liability limits. 14 C. F. R. Sections 221.175 and 221.176. Carriers also include the liability limits in tariffs filed with the Board, as required by Section 403(a) of the Act and Part 221.3 of the Board's Regulations. The Board has also been an active participant in Congressional hearings concerning possible amendments to the Convention.

In March, 1980, our former Policy Development Division sent the Board a memo suggesting that carriers are violating the Warsaw Convention by asserting liability limits much lower than those actually permitted by the Convention. These limitations are expressed in terms of gold and have always been converted to dollars by use of the official rate of gold. Since there no longer is an "official" price for gold in the U. S., the memorandum suggested that the market value of gold has to be used in converting the liability limits to dollars.

BIA and BDA have written memos responding to this suggestion. Each response posed two major objections, *i. e.*, (1) that the recommendation is inconsistent with the intention of the Warsaw signatories and (2) that it is inconsistent with IMF amendments establishing "Special Drawing Rights" tied to a basket of 16 currencies, rather than gold, as the basic unit of account for converting cur-

rencies. The Board has not taken any action on the recommendation.

II. Discussion

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. From 1933 to 1974, gold ownership in the United States was legal only for a small class of uses, such as jewelry-making and dentistry. The price of gold in these transactions was dictated by the government's official price, since it was the government's policy to buy and sell gold at that rate. A private buyer would thus not pay more than the official rate because he could buy it from the government at that price and, conversely, a private seller would not accept less than the official rate because he could sell it to the government for that amount.

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. Seeing no ambiguity, they never addressed the question of whether the official or market rate should be used in converting the limits to national currencies. To determine how the limits should be converted now that there is no official rate, one must attempt to determine what is most consistent with the purpose of the limitation on liability.

The primary purpose of the liability limits in the Warsaw Convention is the protection of carriers from un-

foreseeable and unlimited liability. At the time of the Convention, it was feared that carriers would refuse to carry passengers and/or cargo unless they could measure the scope of risk they were assuming. The limits were thus intended to provide a measure of predictability for carriers so that they could operate free from the fear of unlimited liability.

The use of gold as the unit of account was intended "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency."[3] The use of gold was thus seen as providing more stability than any national currency could, further promoting the predictability the limits were intended to provide. This was because national currencies were subject to devaluation by their country, whereas the value of gold was not subject to change as the result of a single country's unilateral action.

There can be no doubt that use of the official rate of gold produces results more consistent with these purposes than use of the market rate. The official rate of gold, at

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[3] H. Drion, *Limitations of Liabilities in International Air Law* 1954, p. 183. Other writers agree but add that the use of gold was also intended to assure that damages awarded by different countries would have a uniform value and to provide stability in terms of the purchasing power represented by the limits. Bristow, "Gold Franc—Replacement of Unit of Account," LMCLQ 31 (1978), Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5 J. Maritime L. and Com. 645 (1973-74), Norway, "Conversion from Poincare Franc to National Currency," Presented to the 1974 meeting of ICAO's Legal Committee, and Tobolewski, "The Special Drawing Right in Liability Conventions: an Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

least in the United States, fluctuated only rarely. Even in countries whose currencies were devalued more frequently, the official rate would provide greater predictability and stability than the market rate. This is especially true now, since speculation has led to wildly fluctuating market prices of gold.

Use of an official rate is supported by the approach adopted in more recent Conventions, when the ambiguity of expressing limits in terms of gold was more apparent. Both the Convention Concerning Liability for Oil Pollution, signed in Brussels in 1969, and the Convention Relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed in Geneva in 1973, expressly provided for the use of the official value of gold in setting liability limits.[4] Conversion by the official rate is further bolstered by the fact that a majority of courts have used it in converting Warsaw's limits after the official and market rates began to diverge.[5] ICAO also passed a resolution in 1974 opposing the use of the market price of gold in converting Warsaw's limits, which provides a strong indication of how other participating countries feel.[6]

Since it appears that stable limits were of paramount importance to the drafters of the Convention, basing them on the market value of gold would be inconsistent with the

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[4] The Legal Committee of ICAO, *Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions*, 1974.

[5] Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

[6] See footnote 4.

Convention. Since there is no longer an official rate of gold in the United States, however, it is not entirely clear how the limits should be converted.

In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions. Their answer, embodied in the Montreal Protocol, was the substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. The SDR is a creation of the International Monetary Fund (IMF), the agency which establishes the basic ground rules for currency transactions between member countries. Use of SDR's by the Montreal signatories was presumably intended to eliminate the confusion over how the Warsaw limits should be converted from gold to national currencies. With no official rate of gold and a fluctuating market rate which would produce results at odds with the Convention's purposes, the Montreal signatories chose to abandon gold in favor of SDR's because SDR's provided the stability and ease of conversion which had attracted the Warsaw signatories to choose gold as the unit of account.

The United States supported the SDR approach at Montreal and signed the Montreal Protocol.[7] If the Senate had ratified the Protocol, the SDR approach would be law and there would be no problem in determining Warsaw's limits. The Senate has not ratified the Protocol, however, although it was submitted for ratification in January 1977. Its failure to either ratify or reject the Protocol makes determination of the proper conversion rate

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[7] Fitzgerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing Internation Carriage by Air," 42 J. Air L. & Comm. 273, 325, 329-30 (1976).

difficult because (1) as explained above, use of the market rate of gold produces results inconsistent with the Convention's purposes, (2) there is no current official rate of gold and (3) the United States is obligated by international law to refrain from acts which would defeat the object and purpose of the Montreal Protocol.[8]

To fulfill its obligation to observe, to the extent possible, the requirements of both the Warsaw Convention and Montreal Protocol, the Board has for the past five years been engaging in a legal fiction. Unable to use the SDR approach because Montreal has not been ratified and constrained from using the market price of gold because doing so would defeat the object and purpose of both Montreal and Warsaw, the Board has continued to convert Warsaw's limits based on the official rate of gold immediately preceding the elimination of all ties between gold and the dollar.[9] This approach produces the greatest degree of stability possible since the dollar limits will remain constant unless and until the United States reestablishes ties between gold and the dollar.

We believe that the Board's current course of action is superior to any of the alternatives currently available. Use of the last official rate of gold, however, may at times prevent passengers from recovering the full extent of

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[8] Article 18, Vienna Convention on the Law of Treaties, requires a country to refrain from acts which would defeat the purpose and object of a treaty it has signed until it makes clear its intention not to become a party. This obligation applies even when the treaty was signed subject to ratification and has not yet been ratified.

[9] Thus, the notice of Warsaw's limits required by Parts 221.175 and 221.176 of the Board's Regulations is based on conversion at this rate.

damages caused by carriers.[10] Carriers may no longer need the protection of these low limits, given the maturation of the aviation industry since 1929.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U. S. policy in this area in the past. Pending resolution of this issue by the three agencies we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the regulations.

/s/ John Golden

Prepared by:

Steven Rothenberg
Ext. 3-5943

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[10] The limits are $9.07 per pound for checked luggage, $400 for carry-on bags and approximately $10,000 per passenger. The $10,000 limit is superseded, however, by a $75,000 limit adopted by carriers in 1966.

EXHIBIT C—C.A.B. STAFF MEMORANDUM OF MARCH 18, 1980 ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

FOR INFORMATION

CIVIL AERONAUTICS BOARD

March 18, 1980

Approved:

/s/ [Illegible] B. Robertson
Director, BCP

TO: The Board

FROM: Chief, Policy Development Division, BCP

SUBJECT: Warsaw Convention Liability Limits

Article 22 of the Warsaw Convention sets forth the lowest ceilings that airlines may impose on their liability for death or injury to passengers or for baggage loss, damage, or delay in international travel. For reasons explained in this memo, we believe that carriers are asserting limits much lower than those actually permitted by the Convention.

INTRODUCTION

The Warsaw Convention liability limits are expressed in terms of French francs consisting of 65½ milligrams of gold at a standard of fineness of nine hundred thousandths.[1] Article 22 of the Convention provides that, unless the airline and the passenger agree to higher liability, the limits are as follows:

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[1] This refers to a particular French gold coin, the Poincare Franc, that was minted by the French government between 1929 and 1936.

1. 125,000 francs for each passenger;
2. 250 francs per kilogram for checked baggage and goods; and
3. 5,000 francs per passenger for unchecked baggage.

Article 22 further provides that these sums may be converted into any national currency in round figures. Finally, Article 23 renders null and void any contract provision tending to relieve a carrier of liability or to fix a lower limit than that stated in the Convention.

These limits, converted into dollar values, appear in currently effective tariffs on file with the Board, as well as Board-prescribed notices posted at airline ticket counters and included on standard airline ticket forms. Baggage liability limits are now stated at $20 per kilo (or $9.07 per pound) for checked luggage and $400 for carry-on bags. The liability limit for injury or death is stated at approximately $10,000 per passenger. This $10,000 limit, however, no longer applies to passengers involved in travel to, from, or with a stop in the United States. By the Montreal Agreement, which went into effect on May 16, 1966, the carriers bound themselves to a $75,000 liability limit[2] for death or personal injury to passengers.[3] The order approving this agreement remains in effect today.[4]

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[2] In case of a claim brought in a state that makes separate awards for legal fees and litigation expenses, the limit is $58,000 exclusive of such legal fees and costs.

[3] At that time, the 125,000 francs were converted to $8,291.88. In November of 1965, the United States gave notice of denunciation of the Convention because of the low limits it placed on liability for death and personal injury. Subsequently, IATA efforts to effect an agreement among the vast majority of international carriers to voluntarily raise the limits provided a basis for the United States to withdraw its notice of denunciation.

[4] Order E-23680, Docket 17325, dated May 13, 1966 approving Agreement CAB 18900.

THE GOLD FRANC TO U.S. DOLLAR CONVERSION MECHANISM

In converting the Warsaw limits to dollars, the carriers and the Board have always considered (1) the gold content of the Poincare franc, and (2) the "official" price of gold—the par value of the dollar refined in terms of gold for international currency transactions. Over the past ten years, however, actions of the U. S. Congress and the International Monetary Fund ("IMF") have eliminated the role that gold plays in these transactions, as well as the official price of gold on which the Warsaw calculations are based.

The IMF is the agency that established the basic ground rules for currency transactions between member countries, which include the United States and most of our trading partners.[5] This organization is responsible for working out various problems that arise in establishing the relative values of different currencies. Under the original Articles of Agreement of the IMF, each member country was obliged to establish a par value for its currency, expressed in terms of gold or the U. S. dollar (the value of which was expressed in terms of gold) for the official settlement of international currency transactions.[6] Pursuant to this requirement, the United States established a par value of the dollar as $35 per fine troy ounce of gold. In 1972 and again in 1974, Congress passed legis-

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[5] The Bretton Woods Agreements Act (59 Stat. 512, 22 U. S. C. 286), which became effective on December 27, 1945, provides for United States participation in the IMF.

[6] Articles of Agreement of the IMF, July 22, 1944, Article IV, Section 1(a).

lation that changed the par value of the dollar. In each case, the Board ordered corresponding adjustments to carrier tariffs, raising the liability limits to convert the limits of the Convention, expressed in terms of gold, to U. S. dollars.

The first order followed the passage of the Par Value Modification Act,[7] which became effective on May 8, 1972, and directed the Secretary of the Treasury to establish a new par value for the dollar of approximately $38 per ounce of gold. By Order 72-6-7, adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the new par value.

Public Law 93-110 (87 Stat. 352), which became effective in September of 1973, amended the Par Value Modification Act, further devaluing the dollar from $38 to $42.22 per ounce of gold. On January 3, 1974, the Board issued Order 74-1-16, which effected a corresponding increase in the international baggage liability limits to their present levels of $20 per kilo or $9.07 per pound.

Since its inception in 1945, the IMF has amended its Articles of Agreement twice in order to reflect the changing roles of gold and the dollar. The first amendment, which became effective on July 28, 1969, established the special drawing right ("SDR") to replace the dollar as the Fund's basic unit of account and set the value of the SDR at .888671 gram of fine gold.[8] On April 30, 1976, the IMF's

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[7] Public Law 92-268 (86 Stat. 116). Section 2 of the Par Value Modification Act established the new par value of the dollar at one thirty-eighth of a fine troy ounce of gold.

[8] Amendment of the Articles of Agreement, dated April, 1968; Article XXI, Section 2.

Board of Governors approved a second amendment to its Articles which (1) eliminated the obligation of member countries to use gold as a denominator in currency transactions, and (2) eliminated gold as the means of setting the value of the SDR, substituting a formula using a so-called "basket" of 16 currencies of major countries that are members of the IMF.

On October 19, 1976, with the enactment of Public Law 94-564, the United States ratified this amendment and repealed Section 2 of the Par Value Modification Act, thereby eliminating the ties between gold and the dollar, as well as the official price of gold. These changes became effective upon entry into force of the second amendment to the IMF Articles of Agreement on April 1, 1978. Although this action completely abolished the official price of gold, the carriers' liability limits are still being converted to U. S. dollars using the $42.22 per ounce figure. Changes in the applicable laws appear to have removed the legal basis for using this amount, however.

During the early 1970's, the carriers and many governmental aviation authorities foresaw the effects that the changing role of gold could have on the interpretation of provisions like Article 22. Since 1968, a two-tiered system for establishing gold prices had existed, which separated transactions conducted for official monetary purposes through central banks from other transactions such as free market sales of gold. Central banks used the official price, while the free market gold prices were determined by market forces. The gap between the official price and market price began to widen significantly in 1971. While the official price continued to be applied to conversions of gold to dollars for the purposes of Warsaw and other avi-

ation treaties, efforts were intensified to amend Warsaw. The Guatemala Protocol and the Montreal Protocols contain amendments to Article 22 changing the unit of reference from gold francs to SDR's. These protocols, however, have been ratified by very few countries, and none of them have been ratified by the U. S. Senate.

In October of 1974, the Legal Committee of the International Civil Aviation Organization ("ICAO") issued a paper explaining that if the market, rather than the official, price were used to convert gold francs to national currencies, the carriers' potential liability limits would increase abruptly. ICAO adopted a resolution stating that:

> . . . [T]he conversion of the sums fixed in Poincare francs into national currencies other than gold should not be made on the basis of the price of gold on the free market for that metal.

ICAO resolutions may be legally binding when their purpose is to interpret or clarify international agreements. They cannot by themselves be used to amend or modify international treaties, however. The purpose of this resolution was to clarify Article 22 at a time when there were two prices of gold—an official price and a market price —from which to choose. The fact that gold no longer has an official price, however, makes reliance on this resolution unworkable since its application renders the currency clause of the Warsaw Convention impossible to apply without further amendment.

GOLD VALUES AND LIABILITY LIMITS

As long as the official price of gold existed and remained fairly constant, the Warsaw limitations remained close to the level considered adequate to cover passenger

claims filed with airlines back in the 1930's. The limits for death and personal injury increased with the approval of the Montreal Agreement. But baggage liability limits, which started out at $7.62 per pound in 1934, have not risen appreciably since that time. Following the devaluation of the dollar in 1972, they went up to $8.15 per pound, and in 1974 they increased to the present level of $9.07 per pound. For a hypothetical 44-pound lost suitcase, the maximum amounts the carrier would have to pay a claimant were $330, $359, and $400 respectively. During this period, however, the value of the dollar declined. In terms of purchasing power, three hundred thirty 1934 dollars were worth $1,031 in 1972, $1,215 in 1974 and $1,920 in January, 1980.[9]

The liability limits increase dramatically if the calculations are based upon the market value of gold. The following chart illustrates what the liability limits would be at various selling prices of the metal:[10]

Price of gold per troy ounce	Liability for death or injury	Liability per pound for checked bags	Liability for carry-on baggage or for 44-lbs of checked luggage
$42.22	$ 10,000.00	$ 9.07	$ 400.00
$200	$ 47,382.86	$ 42.97	$1,895.31
$300	$ 71,074.29	$ 64.46	$2,842.97
$400	$ 94,765.71	$ 85.94	$3,790.63

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[9] Consumer Price Index, all urban consumers, United States city average for all items.

[10] These figures are based only on the value of gold in the coins. They do not take into account the numismatic value of the Poincare franc, which is now a rare collector's item that sells for many times the value of the metal itself.

$500	$118,457.14	$107.43	$4,738.29
$600	$142,148.57	$128.91	$5,685.94
$700	$165,840.00	$150.40	$6,633.60
$800	$189,531.43	$171.89	$7,581.26
$900	$213,222.86	$193.37	$8,528.91
$1000	$236,914.29	$214.86	$9,476.57

While the figures for baggage liability limits based on the market value of gold are probably in excess of the value of most passengers' checked belongings, the limits on death and personal injury claims are lower than amounts received by many plaintiffs in wrongful death actions.

BACKGROUND OF THE WARSAW LIABILITY LIMITS

The Warsaw Convention was negotiated during the late 1920's when the aviation industry was in its infancy. The minutes of the negotiations show that the primary concerns of the drafters are no longer of great importance to the industry. In addition, their assumptions about how the liability limitation mechanism would work were erroneous.

In 1929, air travel was perceived by the public and, more importantly, by insurance companies to be an extremely risky mode of transportation. A major justification for limiting liability was that, unless carriers could present potential insurers with some degree of predictability in estimating damages from aircraft accidents, they would have great difficulty in obtaining coverage. Furthermore, the delegates had little sympathy for anyone foolish enough to board an airplane without enough personal insurance to provide for his widow (or her widower)

and children should the plane crash.[11] Over the years, air travel has become one of the safest modes of transportation, and airlines, even those operating under circumstances where they cannot limit their liability for death or personal injury, have no special difficulties finding insurers.

The minutes also reflect the delegates' rationale for using gold as the unit of reference in determining carrier liability limits, instead of pegging the limits to some particular currency like the dollar or the franc, with no reference to the metal. The main object of the gold clause was to avoid fluctuations in currency values and problems that might be caused by unilateral action by the government whose currency was used in the liability clause. The qualities of gold that appealed to Warsaw's drafters were its stability and its tendency to reflect real values better than currency.[12] But it didn't work that way. Until recently, we kept the "official" price of gold artificially low and restricted the ability of individuals to buy and sell gold on the market. Thus its price did not reflect the weakened purchasing power of the dollar or of other currencies resulting from worldwide inflation. Now that there are no restrictions on private ownership of gold, it is traded like any other commodity. With speculative buying, its value has soared, and gold has lost its stability as the result of its daily price fluctuations.

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[11] Minutes of the Second International Conference of Private Aeronautical Law, Warsaw, 1929; translated by Robert C. Horner and Didier Legrez, pp. 48-49.

[12] *Ibid.*, pp. 88-91.

Warsaw has become an anachronism, yet various attempts to amend it have become stalled by the ratification process. While the Guatemala and Montreal Protocols would have revised the limits upward, the proposed limits were still relatively low, and none of the proposals contained a mechanism that would provide for periodical adjustments to compensate for inflation. Article 22 tied to gold, however, overcompensates for inflation to the point that the industry may view it as a sort of passengers' affirmative action plan that is supposed to make up for years of unreasonably low limits. Although gold-based limits may not be the most rational approach to allocating risks between carriers and consumers of international air transportation, the framers of Warsaw deliberately adopted this approach—expressly rejecting a dollar or some other currency-based system—and probably left us no flexibility as long as Warsaw remains in effect.

EFFECTS ON THE CARRIERS

Using the market value of gold would affect carriers' liability limits in two important ways. First, the limits would fluctuate on a daily basis, along with the price of gold. Second, at least for the foreseeable future, the new limits would be much higher than those now in effect. Inevitably, these factors will impose new costs on carriers.

Liability limits based on variable gold prices will create administrative burdens for carriers. They will have to keep track of market fluctuations on a daily basis, as they now keep close tabs on daily currency value changes. Airlines will also have to devise a new approach to providing notice to passengers of the amount of their limits

on liability for personal injury, death, or baggage claims. Additionally, variable gold prices may raise questions about which price of gold would be used in particular liability limit calculations—the value on the date the bag is lost or the accident occurs or the price of gold on the date the claim is paid? Because the price on a given day may vary from one gold market to the next, which market quotations will be applied to the settlement? These questions would not present a significant problem in the vast majority of baggage claims, since the maximum liability limits using the market price of gold will probably be high enough to cover most routine claims. For death or injury claims, or in instances where baggage claims approach or exceed the ceiling, the courts will have to decide which price prevails.

The applicability of higher liability limits will, of course, result in higher claim settlements and higher insurance premiums for carriers. The increase in insurance premiums, moreover, may be exacerbated by the fact that the liability limit fluctuates. Since the insurance companies may not be able to predict the average limits that will apply to claims against the policies, they may rely on high projected liability limits in setting their rates. All of these costs will be passed on to all air travelers in the prices of airline tickets.

In the case of baggage liability, carriers will have some control over the escalation of these costs. The actual costs to each airline will depend on the way it handles (or mishandles) suitcases and claims. As international markets become more competitive, carriers will have strong incentives to improve baggage handling, thus reducing

claim costs, rather than routinely settling claims and passing on the costs in higher fares.

CONCLUSIONS AND RECOMMENDATIONS

The Warsaw Convention is a multilateral treaty that has the force of law, and the United States and other signatories to the Convention are obliged to enforce its provisions within their territories as long as it remains in effect. Assuming that since April 1, 1978 there has been no legal basis for the use of the $42.22 per ounce price of gold for converting the Article 22 liability limits to dollars, we recommend that the Board instruct the staff to do the following:

1. Draft an order instructing the carriers to revise their tariffs to reflect more accurately their liability ceilings under Warsaw. In our view, the carriers need not file U. S. dollar equivalents in their tariffs, but could instead file rules with the limits expressed in gold francs.

2. Evaluate the impact such an order would have on the Board's continued approval of the Montreal Agreement. Article 23 of Warsaw renders null and void any provision tending to fix a lower limit than that stated in the Convention. It would therefore appear that the $75,000 limit for death or personal injury may be applied only in the event that the price of gold falls below $320 an ounce, the approximate amount at which the Warsaw limit would equal the Montreal Agreement limit. This raises a possible legal issue: can the Board preserve the Montreal Agreement limit as a floor on carrier liability, even if that Agreement is null and void when the price of gold is higher than $320 an ounce? In addition, the ticket no-

tice could mislead people when the Warsaw limit is higher than $75,000 and therefore cause some injured passengers or their heirs to agree to smaller settlements than they would otherwise receive. The question arises, however, whether the Board can disturb the Montreal Agreement by withdrawing its approval of the notice provisions without threatening the continued applicability of the $75,000 as a floor on the carriers' liability limits.

Board action to change the method of converting gold francs to dollars will have a strong impact on both U. S. and foreign airlines. We therefore suggest that any order which the staff drafts be coordinated with the Departments of State and Transportation before it is sent to the Board for adoption.

/s/ Patricia Kennedy

EXHIBIT D—C.A.B. ORDER 74-1-16 ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 26274

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 3rd day of January, 1974

IN THE MATTER OF WARSAW CONVENTION LIABILITY LIMITATIONS AS EXPRESSED IN U. S. DOLLARS

ORDER

Section 221.38(j) of the Board's Regulations requires U. S. and foreign air carriers which avail themselves of the limits of liability to passengers provided in the Warsaw Convention (49 Stat. 3000; T. S. 876) to include in their tariffs, *inter alia*, a statement as to the amount of the liability limits of the Convention stated in dollars. These provisions of the tariffs, as well as those setting forth limitations of liability under the Convention with respect to baggage and property, restate the applicable law and serve to advise the public of the Convention limitations on their right of recovery for death, or injury or loss or damage to baggage and property.

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from $35 per ounce to approximately $38 which took place effective May 8, 1972, and such revisions have been made. On September 21, 1973, Public Law 93-110 was enacted, further devaluating the U. S. dollar to approximately $42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the

Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.[1]

In view of the foregoing and of all other relevant matters, the Board finds and concludes:

1. That the dollar limitations stated in the presently effective tariffs of the respondent air carriers and foreign air carriers no longer meet the minimum liability requirements of the Warsaw Convention for "international transportation" or of the Hague Protocol[2] and "international carriage" as defined therein.

2. That, in this circumstance, such tariff limitations are inconsistent with the applicable law as set forth in the Convention or the Protocol, and the tariff filing requirements in Section 403 of the Federal Aviation Act of 1958, and Part 221 of the Board's Regulations and they must be canceled.

3. That the minimum acceptable figures in United States dollars for liability limits applicable to "international transportation" and "international carriage" are as follows:

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[1] With respect to their liability to passengers, this order will affect only a small proportion of the U. S. and foreign air carriers. Most carriers engaged in international transportation by air involving journeys to or from the United States adhere to the Montreal Agreement (Agreement CAB 18900 approved by Order E-23680 dated May 13, 1966, 31 F. R. 7302) pursuant to which they have filed tariffs providing for a $75,000 limit of liability for death or injury to passengers. Since this limit is stated in terms of U. S. dollars, it is unaffected by the change in the gold value of the dollar.

[2] The Hague Protocol of 1955 doubles the Warsaw liability limit for passengers, but since the United States has not signed or adhered to the Protocol, its provisions do not normally apply with respect to air transportation.

Convention and Protocol Minimum Liability	Actual	Rounded[3]
125,000 francs (per passenger, Convention only)	$10,002.90	$10,000.00
250,000 francs (per passenger, Hague Protocol only)	20,005.80	20,000.00
5,000 francs (per passenger for unchecked baggage)	400.116	400.00
250 francs (per kilogram for checked baggage and goods)	20.00580	20.00
250 francs (per kilogram on a per-pound basis)	9.07460	9.07

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, particularly Sections 204(a), 403, and 1002 thereof,

IT IS ORDERED THAT:

1. The carriers named in Appendix A, attached hereto, shall revise all liability limitations which may be applicable to "international transportation" or "international carriage" as defined in the Convention or the Protocol which are inconsistent with the dollar amounts set forth herein so as to conform with such amounts.

2. The tariff cancellations directed in ordering paragraph 1 above shall become effective on or before February 6, 1974, on not less than 10 days' notice.

3. That copies of this order shall be served on the air carriers and foreign air carriers named in Appendix A.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

(SEAL) EDWIN Z. HOLLAND, *Secretary*

[3] Article 22 of the Warsaw Convention permits the liability limits specified therein in gold francs to be converted into any national currency in round figures. The Board is permitting the round dollar amounts set forth in this order to be filed in the tariffs for purpose of convenience. This order is not intended to prohibit carriers from specifying the actual dollar equivalents in their tariffs as some of them do at the present time. The dollar values herein are calculated in accordance with the criteria detailed in Order 72-6-7.

EXHIBIT E—ICAO LEGAL COMMITTEE RESOLUTION ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

RESOLUTION
CONCERNING THE CONVERSION OF POINCARE FRANKS TO NATIONAL CURRENCIES IN THE WARSAW AND ROME CONVENTIONS

The Legal Committee of ICAO

Considering that the limits of liability fixed by the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and those determined by the Protocol of the Hague of 28 September 1955 and the Protocol of Guatemala City of 8 March 1971 are expressed in "francs consisting of 65.½ milligrammes of gold millesimal fineness 900", commonly called the Poincare franc;

Considering that the limits of liability fixed by the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on 7 October 1952 are likewise expressed in Poincare francs;

Considering that under these Conventions the conversion of these sums "into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment";

Considering that since 1968 the price of gold on the free market for that precious metal no longer necessarily corresponds to its price calculated on the basis of the official rates;

Considering that the price of gold on the free markets existing in certain countries is subject to significant variations at different times and in different places;

Considering that the official value of currency is used in several Conventions recently entered into or in course of preparation under the aegis of the United Nations and in particular in the Convention Concerning Liability for Oil Pollution, signed at Brussels on 29 November 1969 and in the Convention relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed at Geneva on 1st March 1973;

Considering that at the time of the negotiation of the Warsaw Convention, the Rome Convention and the Hague Protocol the market for gold had a character profoundly different from that which it has today; and that the authors of the Guatemala City Protocol intended to fix a limit of liability corresponding approximately to 100,000 United States dollars;

For the aforesaid reasons, is of the opinion that for the application of the Air Law Conventions and Protocols mentioned above, and in particular the Guatemala City Protocol, the conversion of the sums fixed in Poincare francs into national currencies other than gold should not be made on the basis of the price of gold on the free market for that metal.

EXHIBIT F—C.A.B. STAFF MEMORANDUM OF APRIL 18, 1980, ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

CIVIL AERONAUTICS BOARD
April 18, 1980

MEMORANDUM

TO: Assistant Director for Proceedings, BIA

FROM: Jeffrey Gaynes, Attorney, Legal Division, BIA

Subject: Attached BCP Memo on Warsaw liability limits

BACKGROUND

BCP recommends that the Board consider steps that would change the basis of gold-to-currency conversion for the Warsaw Convention provisions on limiting liability from the official rate for gold to the free market rate, thereby substantially raising the liability limits.

PROBLEM POSED

What would be the legal validity and the ramifications of the BCP proposal?

CONCLUSION

From a strictly legal standpoint, the BCP proposal raises serious questions, but plausible arguments are available to answer at least some of those questions. From a policy standpoint, the BCP proposal holds the potential of causing severe international repercussions, at least as severe as those engendered by the Board's IATA show cause order. It conceivably could cause the breakdown of the whole Warsaw system.

DISCUSSION

I. *Legality of a shift to the free market rate*

BCP has accurately set forth the facts regarding the demise of the post war international monetary system. Writers both pro and con on the validity of shifting to a free market conversion rate concede that the official rate no longer exists.[1] They also agree that neither the text nor the preparatory work of the Warsaw Convention specify clearly which rate—official or free market—the drafters intended to be used. Indeed, the conclusion seems quite certain that the drafters never even considered the problem, since at the time of the Convention's adoption, the two rates scarcely diverged.

The problem thus becomes one of seeking to discern what the drafters would have intended had they thought of the potential ambiguity they were creating. One school of thought says that the chief intent in the liability limitation gold clauses was "to provide a measure of stability in an environment of fluctuating exchange rates and some certainty that the real value of the limitation amount shall be equal regardless of the currency of payment or the time of conversión."[2] Given these key goals—stability, certainty, and uniformity—use of the free market rate,

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[1] Pro: Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. Maritime L. & Com. 73 (1974-75); Con: Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Maritime L. & Com. 645 (1973-74).

[2] Asser, *supra* note 1 at 664. A leading Dutch court has supported this interpretation. Hornline v. Societe Nationale des Petroles Aquitaine, Decision of April 14, 1972 (N. J. 1972, 269).

according to this school, would run directly contrary to the object and purposes of the Warsaw Convention.

Another school says that the true rationale of the Warsaw gold clauses was "to maintain the purchasing power of the agreed quantities of gold and thus to avoid the effects of devaluation."[3] On this theory, conversion at the free market rate would be in complete conformity with the Convention's objects and purposes since the free market rate provides a much better guard against inflation. Furthermore, so the argument continues, use of the free market rate would provide as much if not more uniformity as existed under use of the official rate.

As to which school has the better case, it is probably the former, though the latter (Heller) thesis certainly provides ample material for a strong brief arguing the opposite position.[3a]

The biggest difficulty in the free market rate argument is the subsequent practice of the international community in the years following Warsaw, and especially once the two-tier gold market developed. When an official rate existed, it was always this rate that was used. In discussions producing the higher liability limits of the 1971 Guatemala Protocol, even though the debate was based on the *dollar* value of the new limits, those dollar values

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[3] Heller, *supra* note 1 at 92. *See also* H. Drion, *Limitation of Liabilities in International Air Law* 183 (1954).

[3a] One point in favor of the free market approach is that at least some authors, prior to the current monetary instability, saw it as arguably permissible under Warsaw in cases where no official gold rate was applicable. *See* Drion, *supra* note 3 and Lacombe, La Revision de la Convention de Varsovie, 9 Rev. Gen. De L'Air 179 (1948).

were converted into gold *at the official rate* for expression in gold units in the text of the Protocol. As to the 1974 ICAO resolution, while this was not all that strongly supported (many countries abstained from the vote) and while, in practical terms, it constitutes a dead letter (the official rate no longer exists), it does carry symbolic weight, demonstrating that a significant portion of the international community felt that the official and not the free market rate was the proper one to be used.

All of the arguments made so far can be countered. Prior to the two-tier system, use of the official rate rather than the free market rate really proved nothing, since the two rates were virtually the same. Regarding the discussions at Guatemala, use of dollars rather than gold as the basis for debate demonstrates a recognition by the international community that differences existed within the community on the true place and meaning of gold. And, as was said, the ICAO resolution of 1974 received only moderate support and was approved when the official rate had, for all practical purposes, ceased to exist.[4]

Because of events in 1975, though, the case for the free market rate weakens considerably. The reason is the Montreal Protocol, with its substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. Changeover to SDR's represents a decision by the international community that the gold clauses were no longer adequate in light of the developments in the inter-

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[4] It is also possible that this resolution was never adopted by ICAO as a whole—as the memo implies—but rather only by ICAO's Legal Committee—as some of my research has led me to believe.

national monetary system. Presumably, this assessment was based in large part on the realization that the official rate for gold no longer existed. The scholarly debate in the Journals before Montreal had presented the SDR idea and the free market rate idea as alternative approaches. The delegates at Montreal chose SDR's.

One might be prompted to interject here, "Yes, but the U. S. has not ratified the Montreal Protocol, and the Protocol is not yet in force." True enough. But not determinative. The U. S. was actually a supporter of the SDR approach.[5] The U. S. voted for the changeover to SDR's in the Montreal Protocols. A rule of customary international law embodied in the Vienna Convention on the Law of Treaties, Article 18, states that "a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . subject to ratification. . . ." The President submitted the Montreal Protocol to the Senate for ratification in January, 1977, and it is still pending. The Article 18 obligation endures until a signatory has made clear its intention not to become a party. The U. S. has yet to make such an intention clear. Unquestionably, for the U. S. to now adopt the free market gold conversion rate would severely undermine the object and purpose of the Montreal Protocol. Thus, the United States would be in violation of international law.

The U. S. could, of course, simply demonstrate clearly its intention not to ratify Montreal, e. g., if the Presi-

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[5] Fitz Gerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing Internation Carriage by Air*, 42 J. AIR L. & COM. 273, 325, 329-30 (1976).

dent withdrew it from Senate consideration. This would arguably remove the Article 18 problem and restore the *status quo ante,* in other words, the Warsaw liability limits, gold conversion rate and all. Since no official gold rate exists, the U. S. could adopt the free market rate as the only one practicable. On this, it could argue along the lines set forth by Heller, that it was conforming to the Convention and thereby not violating international law. The move might carry great legal/political ramifications, however, as will be discussed next.

II. *The Legal and Political Fallout From a shift to the Free market rate*

While use of the free market rate might be legally defensible, it is sure to provide a response from other parties to the Warsaw Convention. Some countries might adopt the Asser line of reasoning (see text accompanying footnote 2 supra) and accuse the U. S. of violating the treaty and therefore international law. More likely, however, it is a breakdown in the Warsaw system. A rarely used but nevertheless generally accepted rule of international law allows parties to suspend or terminate their treaty obligations when circumstances forming an essential basis of their consent to the treaty undergo a "fundamental change." This fundamental change of circumstances concept[6] is akin to the frustration of performance concept in American contract law. The disappearance of the official rate for gold and the fantastic inflation of the free market rate together constitute a fundamental

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[6] The concept is sometimes referred to by the Latin terms "clausula rebus sic stantibus."

change of circumstances from the conditions on which consent to Warsaw was based in the late 1920's and early 1930's.[7] Yet, because of the various protocols attempting to adapt Warsaw to the change and because of the continuing adherence to fictional official rates, no state has yet invoked the "fundamental change" doctrine. Were the U. S. to espouse the free market conversion rate, the issue would finally be forced, and the Warsaw Convention then might be so widely denounced or avoided as to become meaningless. According to Peter Schwarzkopf, an end to the Warsaw regime might be a valid policy option, but if this in fact is what the U. S. wants, it should do so forthrightly through denunciation, instead of relying upon the "back door" approach represented by adoption of the free market conversion rate.

Schwarzkopf also anticipates that the BCP proposal would prompt considerable antagonism abroad, producing difficulties in American bilateral aviation relations comparable to those produced by the IATA Show Cause Order. In Schwarzkopf's words, "foreign governments are going to scream." Again, this does not bring him necessarily to reject the proposal; however, he does say that if we approve the proposal, we have got to be prepared for the consequences.

III. *The 1966 Montreal Agreement*

I have not concentrated on this aspect of the BCP proposal because, in light of the anticipated effects of the free market rate proposal, I am not sure that the Montreal Agreement issue will arise. My feeling is that

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[7] Asser, *supra* note 1 at 669.

the negative international reaction to the free market gold idea will produce a similarly negative reaction to the idea of transforming the $75,000 liability ceiling into what would be either a liability floor—or a nullity—as the circumstances (and the Board) might decide. The proposal conveys the impression of an American desire to both have one's cake and eat it, i. e., to use Warsaw when convenient and ignore it when not.

Jeffrey Gaynes
B-57, Ext. 35035

EXHIBIT G—SWEDISH STATUTE ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM SWEDISH

Swedish Collection of Statutes

Law	SFS 1978.132
concerning changes in the Carrier	Printed
by Air Act (1957:297)	on April 13, 1978
promulgated on March 30, 1978.	

According to a Parliamentary resolution[1] it was directed that Chapter 9, § 22 of the Carrier by Air Act (1957:297) be amended to read as follows:

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[1] Bill 1977/78 70, LU II, rskr 145.

Chapter 9

§ 22[2] When transporting passengers the carrier's liability for any one of them is limited to sixteen thousand six hundred special drawing rights and even if the compensation is paid out in the form of an annuity the capitalized value thereof may not exceed said limitation. If the carrier is a Swedish corporation, the liability shall, however, be limited to two hundred seventy thousand Swedish crowns. The carrier shall undertake on the ticket or in its general terms and conditions of passage to adhere to this limitation of liability. In the event the carriage is only partially carried out by a Swedish carrier, what was stated above about the higher limitation of liability and about the obligation to undertake to adhere to this amount shall apply only to such portion of the passage as is carried out by such carrier. A higher liability than stated in this section may be agreed to contractually.

As to checked baggage or freight, the carrier's liability shall be limited to seventeen special drawing rights per kilo. If the passenger or the person sending the freight has upon delivery of the baggage or the freight specially indicated the value of the baggage or the freight and paid the applicable additional charge therefor, the value so specifically stated shall constitute the limitation of the liability of the carrier unless the carrier shall have determined that the actual value of the baggage or freight is lower. If registered baggage or freight is partly lost, diminished, damaged or delayed, or if part of its contents is lost, diminished, damaged or delayed, only the total weight of the item or items in question will be taken into consideration when the limitation of the carrier's liability

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[2] Latest version 1976:11.

is determined, provided, however, that if the loss, diminution, damage or delay affects the value of the other items included in the same proof of passage or airway bill, the aggregate weight of all these items shall also be taken into consideration.

As to objects kept under the control of the passenger, the liability is limited to three hundred thirty-two special drawing rights for each passenger.

The carrier shall pay any legal fees in addition to the limitations of liability stated in this section which might be exceeded thereby. The foregoing shall not apply when within six months of the event causing the damage or before any legal action is initiated the carrier has offered the damaged party in writing compensation which is not less than what is awarded by judgment, legal fees not included.

The term "special drawing rights" means for purposes of this statute the special drawing rights used by the International Monetary Fund. In the event of a claim for compensation such special drawing funds shall be converted into Swedish currency at the rate in effect on the day judgment is rendered. The value of the Swedish crown shall be determined in accordance with the method of computation which the International Monetary Fund uses the same day for its activities and transactions.

This statute shall become effective two weeks after the day when the text thereof shall have been printed in the Swedish collection of statutes.

On behalf of the Government

SVEN ROMANUS

Bengt G. Nilsson
(Department of Justice)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Jesuit J. Tyler

(Jurat dated July 28, 1981, omitting in printing)

EXHIBIT H—BRITISH STATUTORY INSTRUMENT ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

STATUTORY INSTRUMENTS

1980 No. 281

CIVIL AVIATION

The Carriage by Air (Sterling Equivalents) Order 1980

Made 29th February 1980

Coming into Operation 21st March 1980

The Secretary of State, in exercise of the powers conferred by section 4(4) of the Carriage by Air Act 1961(a) and under that provision as applied by Article 6 of the Carriage by Air Acts (Application of Provisions) Order 1967(b) and now vested in him (c) and of all other powers enabling him in that behalf, hereby orders as follows:

1. This Order may be cited as the Carriage by Air (Sterling Equivalents) Order 1980 and shall come into operation on 21st March 1980.

2. This Order supersedes the Carriage by Air (Sterling Equivalents) Order 1979(d).

3. The amounts shown in column 2 of the following Table are hereby specified as amounts to be taken for the purposes of Article 22 in the First Schedule to the Carriage by Air Act 1961 and of that Article as applied by the Carriage by Air Acts (Application of Provisions) Order 1967 as equivalent to the sums respectively expressed in francs in the same line in column 1 of that Table:

Table

Column 1 Amount in francs	Column 2 Sterling equivalent
	£
250	9.67
5,000	193.00
125,000	4,836.00
250,000	9,672.00

E. H. Whitaker,
An Assistant Secretary,
Department of Trade

EXPLANATORY NOTE

(*This Note is not part of the Order.*)

This Order specifies the sterling equivalents of amounts, expressed in gold francs as the limit of the air carrier's liability under the Warsaw Convention of 1929, and under that Convention as amended by the Hague Protocol of 1955, as well as under corresponding provisions applying to carriage by air to which the Convention

and Protocal do not apply. It supersedes the Carriage by Air (Sterling Equivalents) Order 1979.

The sterling equivalents have been calculated by reference to the Special Drawing Right (SDR) value of a gold franc converted into sterling at current market rates. The SDR is based on a basket of 16 major world currencies.

A sterling equivalent for 875,000 francs is no longer specified since the Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979 (S.I. 1979/931) expresses the limits of the air carrier's liability for the purposes of non-international carriage in special drawing rights instead of gold francs.

EXHIBIT I—FOREIGN DECISION OF *STATE OF THE NETHERLANDS V. GIANTS SHIPPING CORP.* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

[*The Netherlands v. Giants Shipping Corp.*,
Rechtspraak van de Week 321 (May 30, 1981)
(Sup. Ct. of The Netherlands May 1, 1981)]

TRANSLATION FROM DUTCH

The Supreme Court of The Netherlands

Having considered the petition of the State of the Netherlands, having its seat in The Hague (hereinafter "the State"), represented by Mr. E. Korthals Altes, Attorney, Barrister at the Supreme Court, said petition purporting to annul a decision of June 13, 1980 of the Court of Appeal of The Hague;

Having considered the written defense lodged by Giants Shipping Corporation, a corporation under Liberian Law, having its seat in Monrovia, Liberia (hereinafter "Giants"), represented by Mr. C. D. van Boeschoten, Attorney, likewise Barrister at the Supreme Court, said defense purporting, primarily, to declare inadmissible the appeal of the State, and, alternatively, to dismiss that appeal;

Having taken into account the pleadings of Attorney-General Haak—delivered also in the matter No. 11.705—purporting, in the matter under reference, to annul the Court's contested decision, but only insofar as it fixes the amount to which Giants' liability is limited at the equivalent in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of exchange of the day on which it [Giants] complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security for this amount, and, insofar as, subject to decision by the Supreme Court, it fixes the amount to which, for the moment, Giants' liability is limited, at 12,764,810 [units of] 1/15 Special Drawing Rights considered equivalent to the franc referred to in Article 740*d*, paragraph 4 of the Commercial Code, as these [Special Drawing Rights] are defined by the International Monetary Fund, converted into Netherlands money according to the valuation method applied by the Fund for its own operations and transactions, at the rate of exchange of the day on which Giants complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security;

Having considered the contested decision and the other documents, from which it appears as follows:

By petition received on June 29, 1979, by the Clerk of the Court, Giants applied to the District Court at Rotterdam with the following requests:

"a. to fix the amount to which Giants' liability, as mentioned in the petition, is limited for the moment at 12,764,810 gold francs, fixed at 65.5 milligrams of 900/1000 fineness;

b. to order that a procedure be instituted for the distribution of this amount;

c. to direct that Giants furnish security by means of a guaranty of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, having its seat in Hamilton, Bermuda, for a maximum amount of Fl. 2,210,000.00, increased by legal interest thereon from the day of the decision in this matter, and increased by an amount to cover the costs of the proceedings, to be fixed at Fl. 10,000.00.

d. to order that, when Giants has satisfied the Court that it has complied with the order referred to under c., a magistrate be appointed to determine the statement of dividends of the aforementioned amount and also an administrator thereof;

e. to order that the security bond referred to in this petition be returned when Giants has satisfied the Court that it has complied with the order referred to under c. and when Giants' petition is granted uncontested, or after any written defense has been conclusively rejected;".

Against this, the State lodged a written defense with the aforementioned Court, which contained the following requests:

"a. to fix, for the moment, the amount to which Giants' liability is limited at the market price of the quantity of gold corresponding to 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, to be calculated at the price on the conversion date as referred to in Article 740*d*, paragraph 4 of the Commercial Code;

b. to direct Giants to furnish good and valid security by means of a bank guaranty;".

The Court, having heard counsel for Giants and the State, among others, in chambers, decided on November 23, 1979, as follows:

"Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.

Directs Giants to furnish security for this amount by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, increased by legal interest from the date of this decision and also by an amount of Fl. 10,000.00 to cover the costs of these proceedings.

Rejects any other or additional claims.".

This decision is based on the following considerations:

"1. that Giants is owner and operator of the Liberian seagoing vessel "Blue Hawk," which collided on December 29, 1978, in Terneuzen with the northern bridge over the outer mole of the western lock and the brake mechanism at the east side of the outer mole of the western lock; that, with respect to that collision, claims for damage to property were lodged against Giants by the State, the Terneuzen municipality and the Taxicentrale [Cab Service] Terneuzen B.V.; that Giants wishes to avail itself of the right to limitation of its liability with respect to said collision, granted it by virtue of Articles 740*a* through 740*d* of the Commercial Code;

2. that the Court fixes the net tonnage of the "Blue Hawk" as referred to in Article 740*d*, first paragraph, of the Commercial Code, and observing the stipulations in the third paragraph of said article, at 12,764.81 tons; that furthermore, the Court, pursuant, to the aforesaid article, limits, for the moment, Giants' aforementioned liability to, and fixes it at, 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness;

3. that Giants and the State, the latter being joined by the Terneuzen municipality and the Taxicentrale Terneuzen B.V., differ in opinion on the applicable conversion rate of those gold francs, as mentioned in the documents;

4. that, for lack of a valid contractual and/or statutory stipulation on a definite conversion rate to be applied, and also because no introduction of such stipulation can be expected, within a period that

would be reasonable for the matter now before us, that might have allowed anticipation thereon, the Court can hardly determine anything other than that the free market value of the aforementioned legally defined quantity of gold determines at present the conversion rate, even if this implies a greater liability than that according to the arrangements applying until August 1, 1978;

5. that, since this is a case of limitation of liability deviating from that under Common Law, this exception should indeed not be interpreted more broadly to the disadvantage of the injured party, than ensues mandatorily from contract or law;

6. that in its petition Giants has offered to furnish security for the amount of liability to be fixed, increased by interest and costs, by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, and the Court considers, under the circumstances of the case, such guaranty sufficiently good and valid security, now that the State has not further supported its opposition thereto;

7. that, insofar as Giants' requests as mentioned hereinabove under b. and d. are concerned, the Court shall not consider these matters before Giants has satisfied the Court that the directive stipulated below has been complied with, as these matters are considered premature at this stage of the request;

8. that, insofar as Giants' request as mentioned hereinabove under e. is concerned, it is not possible

to entertain same, as such request cannot now be brought up;".

Giants appealed against this decision with the aforementioned Court of Appeal, which after hearing at its session of April 18, 1980, counsel for Giants and for the State, gave on June 13, 1980, the following decision, which is now contested in the present appeal:

"Annuls, upon appeal, the decision of November 23, 1979, of the Court in Rotterdam, insofar as it:

(1) fixes the amount to which Giants' liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day security is furnished;

(2) rejects the request that the Court issue an order that a procedure be instituted for the distribution of the amount to which liability is limited;

and, deciding anew in these respects:

(1) fixes the amount to which liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixes at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of the day on which Giants complies with the order, given in the aforementioned decision, to furnish security for this amount;

(2) orders that a procedure shall be instituted for the distribution of the amount to which the liability is limited;

Upholds the aforementioned decision for the rest;

Returns the case to the Court in Rotterdam for further dealing with Giants' request;".

The considerations of the Court of Appeal in the case were:

"1. The present appeal is lodged against a decision given by the Court pursuant to Article 320*c* of the Code of Civil Procedure, on a request submitted by Giants to the Court pursuant to Article 320*a* of said Code.

2. The aforementioned request was to the effect, materially and insofar as is relevant at present, that Giants—submitting to avail itself of the right, granted it by virtue of Article 740*a* of the Commercial Code, to limitation of its liability for claims connected with the collision on December 29, 1978, of the seagoing vessel "Blue Hawk" with the northern bridge over the outer mole of the western lock in Terneuzen — requested to fix (provisionally) the amount of said limited liability, in accordance with the stipulations of Article 740*d* of said Code, at 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness and to order that Giants furnish security for same. The request was also to the effect that the Court give order that a procedure shall be instituted for the distribution of the aforementioned amount.

3. In its aforementioned decision, the Court granted the first request, in such a manner that the

amount to which Giants' liability is limited for the moment, was fixed at "the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day the security is furnished," said security being ordered, at the same time, for said amount, increased by legal interest from the day of the decision and by an amount of Fl. 10,000.00 for the costs of the proceedings. The second request was rejected.

4. The appeal claims, firstly, that the Court wrongfully determined that the amount of the limited liability and the security to be furnished for same be calculated at the rate of the free market value of the mentioned gold francs, and it claims, secondly, that the Court wrongfully rejected the second request mentioned hereinabove.

5. First of all, the question arises whether the present decision is open to appeal, and the Court of Appeal must examine this question officially.

Relative to this question, it must be held that, by virtue of Article 345 of the Code on Civil Procedure, appeal is possible, because according to the law, and in particular also in Articles 320*a* through 320*z* and especially in Article 320*x* of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

As also the term [for appeal] mentioned in said article was observed, Giants' appeal is, therefore, admissible.

6. With respect to the first claim put forward by Giants, as stated hereinabove, it must be held that the system of the procedure for the limitation of the liability mentioned in this case implies—as explicitly expressed in Article 740*d* of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with. Because at the time of the Court's decision and now, it is not certain at what time Giants shall furnish security, and it is, therefore, not possible to determine, at this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion in Netherlands currency of the gold francs must be made at the rate of the free market value thereof, so that this decision must be annulled in that respect. Therefore, all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

7. With respect to the second claim put forward by Giants, as stated hereinabove, it must be held that by virtue of the stipulations at the end of the first paragraph of Article 320*a* of the Code of Civil Procedure, and the further course of proceedings provided for in the subsequent articles of said Code, the decision granting the request as referred to in Article

320*a* must also order that a procedure be instituted for the distribution of the amount to which the liability is limited.

Therefore, the Court wrongfully rejected this request, so that the decision must be annulled in this respect and said order must yet be given.";

Considering that the State contests this decision, basing its appeal on the following grievances:

"Breach of justice and neglect of forms, nonobservance of which brings about nullity, as the Court of Justice considered Giants' appeal admissible for reasons mentioned in the aforementioned decision and which are considered repeated and included herein, and subsequently decided in the verdict of the contested decision, thereby partly annulling the decision of the Court in Rotterdam, as mentioned in the verdict of the contested decision, all this wrongfully for the following reasons:

(a) The Court of Appeal wrongfully admitted Giants' appeal, reasoning that, by virtue of Article 345 of the Code of Civil Procedure, appeal is possible, because according to the law, and in particular also in Article 320*a* through 320*z* and especially in Article 320*x* of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

The legal system, as embodied in the Articles 320*a* through 320*z* of the Code of Civil Procedure, the nature of the present decision as well as, in particular, Article 320*x* of the Code of Civil Procedure,

really does oppose the possibility of appeal against a decision such as the one under discussion, given by the Court by virtue of Article 320*c* of the Code of Civil Procedure.

(b) The Court of Appeal held wrongfully that the system of the procedure for the limitation of the liability implies—as also explicitly expressed, according to the Court of Appeal, in Article 740*d* of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with, and that, as at the time of the Court's decision, like now, it is not certain at what time Giants shall furnish security and it is, therefore, not possible to determine, at this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion into Netherlands currency of the gold francs must be made at the rate of the free market value thereof. The Court of Appeal also decided wrongfully that all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

Judging thus, the Court of Appeal omitted, wrongfully, to determine at which rate—of the day on which Giants complies with the order to furnish security—the amount of 12,764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness is to be computed.

In this respect, the Court of Appeal ought to have confirmed the contested decision of the Court in Rotterdam and fixed the amount to which Giants' liability is for the moment limited, at the counter-value in Netherlands currency of an amount of 12,-764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.";

Considering that Giants, in its statement of defense lodged with the Supreme Court, supported its appeal against the admissibility of the appeal to the Supreme Court by the State with the following arguments:

"The State apparently takes the position that it is one of the parties that appeared in one of the previous instances and that it can, therefore, appeal to the Supreme Court by virtue of Article 426, paragraph 1 of the Code of Civil Procedure. Giants is of the opinion that the State cannot be regarded as a party that appeared in the previous instances and was also not regarded as such by the Court of Appeal. In the appeal proceedings at the Court of Appeal the State has not submitted a statement of defense and the Court of Appeal mentioned the State in its contested decision only as ". . . one of the parties mentioned by Giants toward whom it is of the opinion it can invoke the right to limitation of its liability." The nature of the proceedings under reference implies, furthermore, that those toward whom the limitation of liability can be invoked cannot oppose in a suit such as the one under reference the

(provisional) limitation of the shipowner's liability, but must follow to that end the judicial proceedings initiated with the statement of defense by virtue of Article 320*g*, paragraph 1 of the Code of Civil Procedure. It results from the above that the State is not permitted to appeal to the Supreme Court.

Whereas:

1. Giants argued that the State's appeal to the Supreme Court is not admissible, submitting that the State cannot be regarded as having appeared "in one of the previous instances" in the sense of Article 426, paragraph 1 of the Code of Civil Procedure. This argument must be rejected.

2. The Court mentions in its decision of November 23, 1979, that it has "seen" the State's statement of defense received on July 6, 1979, lodged by the State's solicitor E.C.G. Klinkhamer, Attorney. From this, it must be concluded that the Court permitted the State to submit a statement of defense. The decision also states that the Court, by virtue of its decision of July 6, 1979, which ordered, among other things, that the State be summoned, had heard B. D. Wubs, Attorney in The Hague, counsel for the State. All this means that the State did appear in the first instance in the sense of Article 426, paragraph 1. Though the creditors do not have the right to submit a statement of defense against a request as referred to by Article 320*a* and though the judge is not obliged to summon the creditors mentioned by the petitioner, no stipulation in the law prevents the judge from permitting the submission of a state-

ment of defense and from ordering the creditors to be summoned. In particular, the possibility provided for by Article 320*g*, paragraph 1, second sentence, to submit, when the distribution procedure proper has been started, a statement of defense relating to the points mentioned therein, does not prevent the judge from offering the opportunity for defense already in an earlier stage, i.e., that of dealing with the request as referred to in Article 320*a*. If a creditor availed himself of this opportunity, he did appear in the sense of Article 426, of paragraph 1.

Furthermore, as appears from the decision of the Court of Appeal on the written appeal lodged by Giants, B. D. Wubs, Attorney in The Hague, counsel for the State, was "heard at the session of April 18, 1980." This means that the State also did appear in the appeal before the Court of Appeal in the sense of Article 426, paragraph 1, even though the State—as Giants argued—did not lodge a statement of defense in the appeal proceedings.

The State's grievances as to the nonadmissibility of the appeal to the Supreme Court must therefore be rejected.

3. Part a. of the grievance refers to the ques- of whether the possibility of appeal by the petitioner —the debtor—is open on a decision on a request as referred to in Article 320*a*.

Firstly, the question arises if such a decision can be regarded as "a judgment of the Court" in the sense of Article 320*x*, paragraph 2. A combination of arguments leads to a negative reply.

The latter stipulation speaks of a "judgment," whereas in Article 320*i* the determination mentioned in Article 320*c* is called a "decision." Article 320*x*, paragraph 2, speaks of the "day of pronouncement"; it is not plausible that in the system that was in the mind of the legislator, there was room for a pronouncement of a decision on a request as referred to in Article 320*a*. The short term for appeal—four weeks—is evidently connected with the legislator's desire to accelerate the distribution procedure; same can be started only after the debtor has complied with the order given him by the Court, as referred to in Article 320*c*, paragraph 1. The decision on the request referred to in Article 320*a*, however, precedes the distribution procedure proper, so that the reason to determine a short term for appeal does not apply here. Finally, the mandatory notification to the Clerk of the Court, stipulated in paragraphs 3 and 4 of Article 320*x*, is evidently connected with the tasks with which the Clerk of the Court is charged by various articles—such as Article 320*l* and Article 320*t*, paragraph 1—within the framework of the distribution procedure. The decision on a request as referred to in Article 320*a* is given, however, in an earlier stage and one cannot see what sense a notification to the Clerk of the Court would have at that stage.

All this leads to the conclusion that Article 320*x*, paragraph 2, does not refer to a decision on a request as referred to in Article 320*a*.

4. It should, therefore, now be examined if Article 345 implies that appeal on such a decision is open to the petitioner.

If the request is rejected, or is granted in such a manner that the petitioner—i. e., the debtor—is aggrieved by it, he may appeal against the decision by virtue of Article 345. Neither the law nor the nature of the decision are opposed to it. At this stage, the only question that is relevant is whether, and if so under which conditions, the debtor will be able to have the distribution procedure started. In these cases, the debtor has an interest to submit these questions to the judge in appeal. Article 320*g*, paragraph 1, last sentence—which the State invoked in particular—plays a role only in the next stage, i. e., in that of the distribution procedure proper. For this reason already, that article does not stand in the way of allowing the petitioner the right of appeal with respect to the decision on a request as referred to in Article 320a.

5. The above implies that the Court of Appeal was right in admitting Giants' appeal. Therefore, Part a. of the grievance must be rejected.

6. The grievance under b. has a twofold bearing. In the first place, it purports to argue that the Court should not have abstained from answering the question according to which criterion the amount of 12,-764,810 gold francs, mentioned in the decision of the Court of Justice, should be converted into Netherlands currency. Furthermore, it purports to argue that that criterion should serve the free market value of the quantity of gold involved, on the day security is furnished.

The Supreme Court will address itself first to the question of whether the Court of Appeal should have expressed its opinion on the question of the criterion.

7. The arrangement contained in Articles 320*a*-320*z*, as determined by the Law of June 3, 1965, Official Gazette No. 239, differs insofar as is relevant to this case, from the earlier arrangement, in the sense that under the present arrangement the court fixes the amount to which the liability of the debtor is limited for the moment (Article 320*c*, first paragraph), whereas, previously, the law (in the old Article 320*a*) referred, for the magnitude of the amount to be paid by the debtor, to the relevant articles of the Commercial Code. This means that under the old arrangement, it was initially left to the debtor to determine that amount—with the understanding that during the distribution procedure each creditor could contest the "sufficiency" thereof (old Article 320*l*)—whereas at present, the magnitude of the amount the debtor must pay, or for which he must furnish security, is immediately put under the supervision of the court. The legislator, in so determining, will have intended that the calculation of the amount in accordance with the criteria mentioned in Article 740*d*, paragraphs 1, 2 and 3 of the Commercial Code shall be supervised. The question of what, for the conversion referred to in Article 740*d*, paragraph 4, should be considered as "the rate of the day" of payment, or of furnishing security, was not a problem in the opinion of the legislator; however, in the case before us, it does present a problem, since, as will be discussed in point 10 hereunder, at the time the Court of Appeal pronounced its decision—and also at the time of the decision of the lower court—the official parity of the guilder expressed in gold no longer existed. According to the

documents of the case, this problem was the subject of a debate in the first instance and in the appeal; it was, in fact, the issue of the dispute. Under these circumstances, the Court of Appeal should not have abstained from answering this question.

As it is, the intent of the arrangement—that not the debtor but the judge fixes the amount to which the liability is limited for the moment—implies that the judge must express himself in the order to be given by virtue of Article 320*c*, paragraph 1, on the debated point of the criterion for conversion, to avoid that the debtor himself, when making payment or furnishing security, initially establishes the criterion for the conversion, and, therewith, the magnitude of the relevant amount. In this connection, it must also be noted that Articles 320*d*, 320*e* and 320*f*, paragraph 1, assume that by means of the order given by virtue of Article 320*c*, paragraph 1, it can be shown that the debtor complied with that order: and this also involves that the order should not leave any uncertainty —in cases such as the one before us—on the crucially important point of the criterion for conversion.

Therefore, Part b., insofar as it submits the grievance that the Court of Appeal wrongfully abstained from determining that criterion, is well-founded.

8. Insofar as Part b. purports to argue that the conversion referred to in Article 740*d*, paragraph 4 of the Commercial Code must be made with due regard to the free market value of gold, it must be rejected on the grounds following hereafter.

9. In its judgment of April 14, 1972, Netherlands Case Law 1972, 269, the Supreme Court gave a decision on the manner in which that conversion must be made, which was based, among other things, on considerations drawn from the wording, the history of the origin and the intent of the Treaty, concluded in Brussels on October 10, 1957, on the limitation of liability of owners of seagoing vessels, for the implementation of which Treaty Articles 740*a* through 740*d* were incorporated in the aforementioned Code. That decision held, as long as there are international agreements among a large majority of countries that are a party to said Treaty, on the mutual currency relations that are based on a common valuation of gold, the conversion into Netherlands currency of the franc referred to in said article—hereinafter referred to, for the sake of shortness, as the franc—must be made on the basis of the official, i. e., the legally fixed, parity of the guilder expressed in gold at the time of said conversion, and not on the basis of the rate of gold quoted at that moment on the free market.

10. Since that time, far-reaching developments have occurred in the international monetary field, which led to the Second Amendment to the Articles of the Agreement of the International Monetary Fund (Journal of Treaties 1977, 40), approved for the Kingdom by the Law of March 23, 1978, Official Gazette 173, and, in connection therewith, to the introduction, effective as of August 1, 1978, of the Law concerning the rate of exchange of the guilder, and the repeal, connected therewith and effective as of the same date, of the Law on the par value of the guilder.

These developments indicate, insofar as is relevant here, and as far as the Netherlands are concerned at least since the aforementioned date, that gold has lost all monetary significance. One cannot speak any more, at present, of an official parity of the guilder expressed in gold. This means that in the light of the objectives of the Treaty of 1957—as expressed by the Supreme Court in its aforementioned judgment—the appropriateness of the franc, expressed in gold, to serve as a generally accepted unit of account for determining internationally uniform limits of liability was lost.

11. Consequently, a lacuna occurred in Article 470*d* and in the stipulation of the treaty on which it was based. To fill same, steps were taken meanwhile, both on the international level and by national legislators, which led to the adjustment of the Treaty of 1957 to the new monetary situation by means of a Protocol established in Brussels on December 21, 1979, amending said treaty, and to similar adjustments of the national legal arrangements in various countries by means of legislative measures; in this country, a draft bill (No. 15.459) for such a law was passed by the Second Chamber of Parliament on February 17, 1981.

However, as long as the adjustment arrangement as referred to hereinabove has not yet force of law in the Netherlands, the judge cannot—also because of the considerations under point 7 hereinabove—abstain from giving a conversion standard.

12. The point of departure should be the preference—underlying the Treaty and, therefore, Article

740*d* as well—for a standard which is current in the international monetary field for determining the internationally uniform limits of liability intended by the Treaty.

To convert the franc in the manner the State pleads in these proceedings, according to the price of gold on the free market, would be contrary to this point of departure. The aforementioned point of departure will rather lead to joining the choice made by the Member States of the International Monetary Fund for a unit of account which is suited to be used as such in international payments, since gold has ceased to be a monetary standard. The choice fell on the Special Drawing Right (SDR) of the aforementioned Fund, the value of this unit being initially expressed in gold, i.e., a weight amounting to approximately 15 times the gold weight of the aforesaid franc.

This ratio, and the circumstance that, when gold as a value standard of the SDR was replaced by a collection of national currencies (the so-called standard basket), and the new criterion was chosen in such a manner that at the moment of change, the value of the SDR was the same according to both criteria, make it possible to join this choice by considering the franc equal to 1/15 SDR for its conversion into Netherlands currency and to effect the conversion according to the valuation method applied by the Fund for its own operations and transactions.

13. To fill the lacuna in this manner is in harmony with the legal conceptions adopted since, as these find their expression in the arrangements made

recently that aim at the adjustment of international treaties and national laws to the changed monetary situation. With respect to various treaties in which the franc is used as unit of account, amending protocols were adopted, such as the one already mentioned, that prescribe that the franc be considered equal to 1/15 SDR for conversion into national currency; the same applies with respect to the adjustment legislation adopted in several countries and, likewise, the aforementioned draft bill opted for this solution.

14. Objecting to conversion of the franc on the basis of 1/15 SDR, the State submitted that the value of the SDR in terms of purchasing power had considerably declined since the time when this unit was still expressed in the aforementioned weight of gold; as a consequence thereof, conversion of the franc on the aforementioned basis leads to a real reduction, which cannot be neglected, in the liability limits provided for in the Treaty and in Article 740*d*. This circumstance cannot, however, become a decisive factor when the judge makes his choice on how to fill the lacuna. Even if the aforementioned limits would require revision in connection with the decline of the purchasing power of the unit of account to be applied, it is not the task of the judge to provide for this, but it is up to the legislative body of the treaty and/or the national legislator to intervene.

It is worth noting, in this connection, that on November 19, 1976, a Treaty was concluded in London —which has not yet taken effect, however—on the limitation of liability for maritime claims (Journal of Treaties 1980, 23). This Treaty is intended to replace

the Treaty of 1957 and contains considerably higher limits of liability, expressed in SDRs.

15. The fact that Part b. of the grievance, insofar as it concerns the complaint described hereinabove at the end of point 7, is founded, implies that the decision of the Court of Appeal cannot be upheld, insofar as the Court of Appeal held that it could abstain from making a decision on the point in dispute between Giants and the State concerning the conversion criterion to be applied. The Supreme Court can settle the case itself.

It follows from the above considerations concerning the conversion criterion, that grievance 1 of the appeal is founded, insofar as it argues that the franc is to be considered equal to 1/15 SDR for the purpose of conversion. No appeal to the Supreme Court was made against the decision of the Court of Appeal on grievance 2.

The above leads to the conclusion that the decision of the Court of Appeal only need be completed to the extent that it is necessary to state the criterion——mentioned below—for the conversion of the amount in francs mentioned by the Court of Appeal;

Annuls the decision of the Court of Appeal, but only insofar as the Court of Appeal omitted to state the criterion according to which the relevant amount in francs is to be converted;

Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 francs fixed at 65.5 milli-

grams gold of 900/1000 fineness, this franc to be considered equal to 1/15 Special Drawing Right as it is defined by the International Monetary Fund, and at the rate of the day on which security is furnished, to be converted in Netherlands currency in accordance with the valuation method applied by the Fund for its own operations and transactions;

Rejects the appeal in all other respects.

So done by Deputy Chief Justice Ras and Justices Haardt, Royer, Martens and de Groot, and so pronounced by the aforementioned Mr. Haardt, Attorney, in public session on the first of May nineteen hundred and eighty-one, in the presence of the Attorney-General.
(signatures)

(signature)

(Rubber stamp:

Certified true copy)

The Clerk of the Supreme Court of the Netherlands

(signature)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

IRWIN STYLES

EXHIBIT J—FOREIGN DECISION OF *LINEE AEREE ITALIANE V. RICCIOLI* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

Translation from Italian

THE REPUBLIC OF ITALY

IN THE NAME OF THE ITALIAN PEOPLE

THE CIVIL COURT OF ROME

DIVISION IV

consisting of the following judges:

Dr. Salvatore CASELLA — President

Dr. Ivo GRECO — Judge

Dr. Francesco VIZZA — Judge,

sitting in the Court's chambers, hereby issues the following:

JUDGMENT

in the civil case of first instance, recorded as No. 16368 in the General Register of Legal Actions for 1973, rendered in the session in open court on 10/10/78, in the dispute

BETWEEN

Linee Aeree Italiane (L.A.I.), currently in liquidation, represented by the person of the provisional liquidator with elective domicile in Rome, Via del Traforo 146, c/o the chambers of his counsel Edoardo Marino, who represents it by virtue of the power-of-attorney granted to him.

Appellant,

and

Eugenio Riccioli, assisted by his daughter Marianna Riccioli, with elective domicile in Rome, Via di Villa Emiliani 11, c/o the chambers of Rosario Pettinato Marchese, his legal counsel who represents same by virtue of the power-of-attorney granted to him.

Respondent.

SUBJECT: objection to payment order.

RELIEF REQUESTED

During the hearing of January 13, 1978 for submitting requests for relief, counsel for Appellant submitted the following specific requests:

"I hereby request the Court of Rome to reject any request to the contrary, and:

(1) to stay in accordance with the law, the execution of the judgment of the Rome Appeal Court, No. 2358/71, fully described during my pleadings;

(2) to declare the payment order served on behalf of Riccioli on June 27, 1973 to be null and void;

(3) to order, as a subordinate measure and, provided that the executing judge feels able to release the funds, payment of the balance due to Mr. Riccioli, i.e. 284,065 lire in addition to the interest on the arrears and in addition to the legal costs referred to in the previous judgment; the plaintiff is prepared to pay this sum to Riccioli immediately, subject to the pending appeal and therefore without consenting to the order for execution included in the above mentioned judgment of the Appeal Court;

(4) to order Riccioli, as above assisted by his daughter, to pay the fees and costs of the present judgment.

Reserving all other rights."

HISTORY OF THE CASE

In the summons issued on 9/29/1960, Eugenio Riccioli declared that as a result of a crash-landing on 12/29/51 near Malpensa Airport in a I Luck aircraft belonging to L.A.I. (Linee Aeree Italiane S.p.A., now in liquidation) he had suffered personal injuries.

After long negotiations, Riccioli reached a settlement with the Airline, as a result of which he received the sum of Lire 4,900,000 in 1957.

Subsequently, the after-effects of the injuries received in the accident worsened and Riccioli brought L.A.I. before the Court of Rome to request further compensation for his injuries.

In judgments rendered on 12/5/1964 and 1/21/1965, the Court of Rome granted Riccioli a further sum of 300,000 lire as damages, under Art. 948 of the Navigation Act (amended by Arts. 3 and 4 of Law No. 202 of 4/16/54), which provided that the maximum damages due for injuries sustained in an accident was Lire 5,200,000 (Lire 5,200,000 — 4,900,000 = lire 300,000).

The Appeal Court of Rome, considering Riccioli's claim on appeal, set aside the judgment of the Court of Rome and found that the Warsaw Convention of October 12, 1929 should apply, according to which (Art. 22) 125,000 gold francs was the maximum amount which could be claimed for personal injuries, and accordingly ordered

L.A.I. to pay further damages to Riccioli, being 'the difference between the sum of Lire 4,900,000 already paid to the injured party and the equivalent of 125,000 gold francs in Italian lire.' On 6/27/1973 Riccioli, who meanwhile had lodged an appeal with the Supreme Court against the decision of the Appeal Court of Rome submitted to L.A.I. a claim for the sum of Lire 24,039,816. L.A.I. rejected this claim on the grounds that:

(a) the sum claimed by Riccioli was justified and payable but not in the amount claimed, since it could not be determined by a simple arithmetic calculation;

(b) that Riccioli had deducted from the 125,000 gold francs due according to the Warsaw Convention, but wrongly determined on the basis of the normal French franc, the sum of Lire 4,900,000 without taking due account of the fact that at the time of the transaction said sum was already worth 117,780 gold francs;

(c) that in order to calculate the remaining value of the gold francs, Riccioli had wrongly referred to the quoted currency values and not to the gold content of the individual currencies in relation to the gold content of the Warsaw franc.

It therefore requested the Court to declare Riccioli's claim null and void, and to order Riccioli to pay the costs.

Riccioli contested the grounds for their request, and requested the Court to reject it.

After hearing the pleas of both sides, the Court deliberated on the facts, and holding that the evidence submitted for calculating the equivalent in Italian lire had been furnished by Alitalia, which was not a 'Public Ad-

ministration' under the terms of Art. 213 of the Code of Civil Procedure, reserved judgment on the case, ordered an expert's report and requested the parties to appear before the investigating magistrate for a discussion of the procedure to be carried out.

When the expert's report had been completed by Dr. Marchetti, an official of the Central Exchange Control Board, both parties formulated again their requests for relief and the case was submitted again to the Court for its decision.

REASONS OF THE JUDGMENT

Art. 22 of the Warsaw Convention of 10/12/1929, ratified and made effective in Italy by virtue of Law 841 of 5/19/1932, limiting the carrier's liability for personal injuries to 125,000 gold francs, understood by the term "franc" a currency unit (the French franc) composed of 65.5 mg. of gold, of a fineness of 900/1000.

The Article in question (subsection 4) provided that the carriers could convert this sum into their national currency on the basis of the gold content.

Accordingly, and in view of the fact that the Appeal Court of Rome had ordered LAI to pay 'the difference between the sum of 4,900,000 lire . . . and the lire equivalent of 125,000 gold francs, calculated on the day of payment,' the main point of this case is to determine the lire equivalent of one gold franc.

The technical expert pointed out that since the Italian Government, on 2/4/1973, had decided to allow the lira to float freely, it is no longer possible—today—to determine the ratio between the gold content of the lira and that of

other currencies, and that one cannot even indirectly determine the gold content of the lira today.

Moreover, the gold content could not be determined on the basis of the provision by which the Bank of Italy was authorized to compute its gold holdings on the basis of the quotations on the international market.

The reason for this is that the determination of this value is merely a convention.

It is not possible, therefore, to work out an 'official' value-equivalence between the Italian lira and the French gold franc referred to in the Warsaw Convention.

However, there are various criteria by which the value of the Warsaw franc can be expressed in Italian lire, and one of these (of the many indicated by the Exchange Control Board) seems to the Court to be closer to the 'official' value; this is the value calculated on the basis of the Special Drawing Rights, defined in January 1976 by the International Monetary Fund which issues a daily quotation therefor on the basis of the market value of a basket of 16 currencies (CTU report page 6).

On 12/31/1976, this unit of account was quoted at 1,016.60 Italian lire.

The gold content of the SDR in 1970 was quoted at 0.88867088 grams of fine gold, which makes it possible to calculate the gold franc value in terms of Italian lire at 67,438, using the following calculation provided by the Exchange Control Board (page 7):

$$\frac{0.88867088}{0.5895} = 15.075; \quad \frac{1016.60}{15.075} = 67{,}436 \text{ lire}$$

where 0.88867088 is the fine gold content of the SDR; 0.05895 is the fine gold content of the 'Poincare' French franc (defined by the Law of 6/25/28—cf. Exchange Control Board report on p. 1); 1016.60 is the equivalent value in Italian lire of the SDR quoted on 12/31/76; and 15.075 is the ratio between the fine gold content of the SDR and the 'Poincare' French franc.

On the basis of this ratio, and taking the Lire equivalent of the gold franc, it is now possible to work out the value in Italian lire of the maximum damages due for personal injuries laid down in Art. 22 of the Warsaw Convention: 125,000 × 67.436 = Lire 8,429,500. Since Riccioli has already received the sum of Lire 4,900,000, the difference between the maximum amount due and the amount already received, as the Appeal Court of Rome rightly found, is Lire 3,529,500 (8,429,500—4,900,000).

It should be noted, in this connection— ,that it is not possible to calculate the value in 1957 (when the Riccioli-LAI transaction was effected) of the Lire 4,900,000 in order to determine the percentage of the 125,000 gold francs corresponding to the payment already made.

Since this Court merely shall interpret the judgment of the Appeal Court of Rome, it cannot go beyond the effective tenor of the judgment.

The Appeal Court of Rome had ruled that LAI shall pay to Riccioli 'the difference between the sum of Lire 4,900,000 . . . and the equivalent of 125,000 gold francs, calculated on the day of settlement.' It therefore follows that the only possible way of calculating this is to determine the current lire equivalent of 125,000 gold francs and

deduct the sum of Lire 4,900,000, excluding any other calculation or consideration.

It should also be stated that the substance of the Warsaw Convention cannot be deemed to be a 'gold clause,' as the defendant maintains, linking the settlement to a value that is automatically adjusted to the market value of gold.

There is no doubt that Art. 22 of the Warsaw Convention intended to refer to the actual value of the damages in terms of a single criterion, but, at the same time, one which would evolve in the course of time. The reference to the gold franc and its fine gold content can only be construed as the intention to lay down a system for calculating the damages through the currency exchange system, which would be able to guarantee the real value of the damages simply by selecting the fine gold content of a given currency as a unit of value. Otherwise the Convention would not have made any reference to a currency (gold franc), but simply have expressed the amount in terms of a given quantity of fine gold. This would be the only case in which one could rightly refer to the market value of gold. But, as we have seen, the interpretation which most closely reflects the will of the international legislators excludes valuation, which in any case would have led to a totally different sum payable in settlement.

To conclude, and adopting a criterion that is very close to the official exchange rate between the two currencies, the court holds that the criterion to be followed is the one which best reflects the intention underlying the Warsaw Convention.

Accordingly ,the claim for damages served on LAI on 6/27/1973 is therefore reduced to Lire 3,529,500 for the capital due, and the other moneys claimed shall be reduced proportionally.

In view of the specialized nature of the question, and the fact that both parties have mutually compromised in part, the Court feels that there are just grounds for considering that both parties to the hearing have been fairly compensated for their legal costs.

THEREFORE

The Court, in its final judgment, having heard the Counsel for both parties, reduces the capital claimed on 6/27/1973 by Eugenio Riccioli from LAI in settlement to Lire 3,529,500, and the other items in proportion thereto.

It also declares that both parties' costs have been settled. Rome, 11/14/78.

(signed . . . sealed . . .)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Styles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT K—EXPERT'S TECHNICAL REPORT IN THE *RICCIOLI* DECISION ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM ITALIAN
EXPERT'S REPORT ORDERED BY THE ROME CIVIL COURT, DIVISION 4, ON 4/5/1976

CIVIL CASE—LINEE AEREE ITALIANE (LAI) VERSUS SIG. EUGENIO RICCIOLI

I. In respect of the questions put by the 4th Division of the Rome Civil Court on April 5, 1976:

(a) the 'Poincare" French franc, defined in the Act dated 6/25/1928 as having *a gold content of 0.05895 grams of fine gold*, was legal tender in 1929. Since the gold content of the lira at that time was 0.07919 grams of fine gold, the ratio between the two currencies was FF 100=Lire 74.44. The average official exchange rate for 1929 was FF 100=Lire 74.8296;

(b) since 1929 official exchange rates and parity values have changed many times. As stated in (a) above, in 1929 the exchange rate was FF 100 = 74.83; the official exchange rate today is given by the average official daily rate recorded by the Italian Exchange Control Board (U. I. C.) and published in the Official Gazette of the Italian republic.

The following may be noted with regard to the gold content of the two currencies:

(1) the 'Poincare" French franc contained, as mentioned above, 58.95 mg of fine gold, whereas the franc as defined in the Act of 8/10/1969 contains 160 mg of

fine gold. The ratio between the two—bearing in mind the conversion from Old Francs to New Francs on 1/1/1960—is 0.3684. But since today's French franc is a floating currency, the parity rate as given is only the legal rate, and no longer corresponds to the real exchange rate.

(2) With regard to the lira, which had the gold concontent in 1929 that is given in (a) above, it should be recalled that within the meaning of Art. VIII of the International Monetary Fund's Statutes, ratified by Law No. 132 of March 23, 1947, Italy declared, on March 30, 1960, that "625 Lire is the parity rate for one US dollar." Since on that date the gold content of the US dollar was 0.88867088 grams, an equivalent gold content of the lira of 0.00142187 grams can be obtained from the two ratios given above (i. e. 1 US$ = Lire 625, and 1 US$ = 0.88867088 grams). By Decree-Law No. 14, of 1/28/1960, the Bank of Italy was authorized to calculate its gold holdings at the rate of Lire 703.297396 per gram of fine gold, which was exactly the reciprocal of 0.00142187 grams to the lira.

Since 1971, the US dollar has been devalued twice, and its gold content has been reduced to 0.736662 grams of fine gold (the second devaluation was on February 11, 1973, later ratified by Congress, and notified to the I. M. F.); in December 1971 Italy notified the I. M. F. that the 'middle rate' for the lira was Lire 581.50 = 1 US$, without modifying the Decree-Law of 1/28/1960 referred to above. Taking the new gold content of the US dollar in terms of the external

values notified to the I. M. F., namely, 625 lire to the dollar (parity rate) and 581.50 lire to the dollar (middle rate), the gold content of the lira was respectively, 0.00117865 grams and 0.0012668 grams.

On February 4, 1973, the Italian Government decided to float the lira. As a result of this measure, it is no longer possible to work out the ratios discussed above, and it is not even possible to calculate the gold content of the lira indirectly.

With Decree-Law No. 867, of December 30, 1976, and the subsequent Ministerial Order, the Bank of Italy and the U. I. C. were authorized to calculate their gold holdings at the end of each quarter according to the international market quotations. On December 31, the figure thus obtained was Lire 3,178.916 for 1 gram of fine gold.

But these steps cannot help to work out the gold content of the lira because the determination of this value is purely conventional and varies from time to time.

(c) To work out the lira equivalent of foreign legal tender, the Italian monetary authorities determine a daily official exchange rate for the "exchange account currencies" (the fifteen leading world currencies), while indicative quotations for the other currencies are obtained from the foreign markets (Zurich and London).

There is no official equivalent value for currencies that are not legal tender.

On the basis of these technical reports in reply to the question put by the 4th Division of the Rome

Civil Court, it does not appear to be possible to quote an 'official' lira equivalent for the French franc, referred to in the Warsaw Convention of 10/12/1929. Such an official equivalent depends on the present operation of the international monetary system which permits currencies to float freely, and a free gold market. It is therefore necessary to examine the legal or de facto ratios to serve as a basis for working out the lira equivalent to the franc.

II. Below we give a resume of these ratios:

(1) taking the 'parity' rate as 1 US$=625 lire, and the US$ gold content at 0.88867088 grams we obtain from the two ratios and the gold content of the 'Poincare" franc, for the latter a value of lire 41.46, computed as follows:

$$\frac{0.88867088}{0.05895} = 15.075 \qquad 625 \div 15.075 = 41.46.$$

(2) Since 1971, the United States dollar has been devalued twice, reducing the gold content to 0.736662 grams of fine gold, and Italy has allowed the lira to float freely, after a period in which it applied the 'middle rates' system, notifying the IMF that 1 US$ was worth lire 581.50.

On the basis of these new ratios, the gold franc would be worth, respectively:

(a) Lire 46.53 and (b) 70.022, obtained by the following calculations:

(a) $\frac{0.736662}{0.05895} = 12.496 \qquad 581.50 \div 12.496 = 46.53$

(b) $\frac{0.736662}{0.05895} = 12.496 \qquad 875 \div 12.496 = 70.022$

(lira exchange rate on 12/31/76)

The ratio given in (2) is also used by the Bank for International Settlements, whose balance sheet is prepared in gold francs, although with a different gold content;

(3) in January 1976, the IMF decided to gradually reduce the role of gold in the international monetary system, and recognized the Special Drawing Rights as the main means of payment, and basis for international reserves. This accounting unit, introduced in 1970, was given an initial gold content of 0.88867088 grams of fine gold & equal to that of the dollar before the 1971 devaluation—which is still used for certain accounting operations between the Fund and the member countries. Since June 1974 the Fund has worked out the daily quotation of the SDRs on the basis of the market value of a basket of 16 currencies. On December 31, 1978, the value was 1 SDR = Lire 1,016.60.

It should be recalled that several countries—such as Germany since March 1973—had already been expressing the value of their currencies in SDRs, rather than in gold or US dollars.

Assuming the SDR to have a gold content of 0.88867088 grams, the gold franc is worth Lire 67.436, which takes also into account the daily SDR value calculated by the IMF.

$$\frac{0.88867088}{0.05895} = 15.075$$

1016.60 (SDR value on 12/31/1976) : 15.075 = 67.436

(4) Taking the actual gold market price, and the official US$:Lira ratio (1 oz. of gold = $137, and

1$ = Lire 875, at the end of December), the gold franc would be worth Lire 227.215 as follows:

1 gram of gold = $4.405

$4.405 \times 0.05895 = 0.259$

$0.259 \times 875 = 226.625$.

III. It is, however, felt that the values given under (2b) and (3) above are the closest to the 'official' values, namely, the values according to which international transactions are made.

To work out the equivalent value of the lira in relation to gold-linked currencies according to pre-existing international agreements for settling specific transactions, one should use the lire value of the SDR which is used for official transactions. This value would, substantially, be the lira value of the currency worked out indirectly on the basis of third currencies 'with an official gold content' (e. g., the US dollar, the Belgian franc, e c.), and the current market exchange rates for the lira against third currencies. This value would also be in line with analogous payments from abroad to Italy, or settled abroad in currencies 'having an official gold content.'

The value thus obtained would be substantially in line with the rate at which the Bank for International Settlements converts lire into gold francs (but with a gold content of 0.29032258 grams), the currency which the bank uses for its balance sheet. Assets and liabilities expressed in different currencies are converted into gold francs if they are in US dollars at

the rate of 1 US$=0.736662 gram of fine gold, while central bank exchange rates or market rates are used for all other currencies in terms of the US dollar.

With regard to the "value" of the amount of 4,900,000 lire already paid to Mr. Riccioli on December 20, 1957, there appears to be no problem at all.

The Rome Court of Appeal ordered LAI to pay "the difference between the sum of 4,900,000 lire already paid to the injured party, and the equivalent in Italian lire of 125,000 gold francs, calculated on the date on which payment is actually effected."

As (a) it appears to be impossible to convert 1957 lire into gold francs, and (b) the Court expressly speaks of deducting "a sum in lire", once the equivalent value in lire has been computed on the day of payment of 125,000 gold francs, the amount in lire merely has to be deducted therefrom.

[date and signature illegible]

EXPERT'S REPORT ORDERED BY THE ROME CIVIL COURT—DIVISION 4, ON APRIL 5, 1976.

Civil case between Linee Aeree Italiane (LAI) and,

Mr. Eugenio Riccioli.

Meeting with the parties to the case.

Minutes

On March 23, 1977 at 12 noon in my office (Ufficio Italiano dei Cambi), in Rome, Via Quattro Fontane 123, the undersigned, Gian Franco Moschetti, charged by the Rome Court on April 5, 1976, and in execution of the order

given to me on February 23, 1977, began the technical report.

At the invitation issued to both parties on February 23, Mr. Edoardo Marino duly appeared, as Counsel for LAI, requesting me to proceed with the report and to answer the questions posed by the Court.

I asked for some general information, and was given an exhaustive reply. I then deferred the rest of the operation until a reply had been received from the other party.

March 23, 1977 (signature)

Further to my second request, by registered mail dated May 19, Mr. Rosario Pettinato Marchese appeared at my office on May 22, representing Mr. Riccioli, and confirmed that he had nothing to add to the requests made by the Court.

May 22, 1977 (signature)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York, 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Styles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT M—FOREIGN DECISION OF *HORNLINIE A. G. v. SOCIETE NATIONALE PETROLE AQUITAINE* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

Court Decisions—Jurisprudence
HOGE RAAD VAN DE NEDERLANDEN
14-4-72

Voorzitter: Mr. Wiarda

Raadsheren: M. M. Dubbinck, Peters, Ras, Drion

Adv. Generaal: Mr. Berger

Advocaten: Mrs. S. K. Martens, B. W. J. H. de Liagre Bohl

S. S. HORNLAND/S. S. PRESIDENT ANGOT. Hornlinie A. G./Societe Nationale Petrole Aquitaine.

Summary: COLLISION/LIMITATION OF LIABILITY/ GOLD FRANC/POINCARE FRANC/ BRUSSELS CONVENTION OF 1957 (Limitation)/ BRUSSELS CONVENTION 1969 (Pollution).

The conversion rate of the gold franc, under the Brussels Convention on shipowners' limitation of liability, shall be calculated on the basis of the official value of the currency in relation to the Poincare' gold unit, and not on that of the free market.

Conclusion of the honourable Advocate General Berger LL.M.

My Lords,

For the factual backgrounds of the legal dispute now placed before Your Honourable Court I would in order to avoid repetitions, refer to the reasons for Judgement of the decision appealed against. The question to which the grounds of Cassation calls for an answer is: in accordance

with what price must the amount expressed in gold francs to which the ship-owner can limit his liability in terms of Article 740 d of the Code of Commerce, be calculated by the Netherlands Courts of Law as at the 2nd May 1969 that is to say in accordance with the "official" price of gold at U. S. $ 35,—per troy ounce then obtaining or alternatively in accordance with the price of gold on the free market which was at that time considerably higher?

Let it be stated at the outset that the "official" price of gold is the price which was expressed in the provisions of the Bretton Woods Convention of 1944, whereas the price of gold on the free market is the price of a quantity of gold which has to be paid on such a market.

The Arrondissement Court, in the Judgement appealed against, decided in conformity with the view put forward by the Respondent in the Cassation proceedings, that the conversion referred to above has to be effected on the basis of the official price.

After having ascertained that in this matter no decisive meaning can be attributed to the wording of Article 740 d sub-paragraph 4 of the Code of Commerce and that the history of the formation of the International Convention relating to the limitation of the liability of Owners of sea-going ships, of Brussels dated the 10th October 1957 (Trb. 1958, 46) from which the said Article originates, also fails to give a conclusive answer thereto, the Arrondissements Court sought and found the basis of its decision in the tenor of the arrangement whereby the liability of the ship-owner is limited. As was ascertained in the Judgement appealed against, the question here in issue has on a few occasions been touched upon at the Conferences of

Madrid (1955) and Brussels (1957) but a final point of view was never arrived at.

At a previous Conference in Amsterdam (1949) it was stated on the part of a Netherlands representative in a report:

"Avant la Conference d Anvers un effort avait ete fait de trouver une solution dans le rattachement de la clause-or aux regles du Fonds Monetaire International (l'accord de Bretton Woods). Au cours des debats de la Conference d'Anvers un grand numbre des delegues ont exprime un manque de confiance a l'egard de l'efficacite de l'accord de Bretton Woods, de sorte que la suggestion fut rejetee" (Bulletin No. 104, Conference d'Amsterdam 1949, page 33).

In this connection it is perhaps rather interesting to refer to the proceedings at a Meeting of the International Sub-Committee on Limitation of Shipowners' liability and the "Gold Clause held in London on the 6th July 1949 (the report thereof is inserted in the aforesaid Bulletin No. 104 after the Rapports Preliminaires). It was there argued on the part of the representatives from England that a link-up of the limitation of liability with gold would not be advisable because the official price of gold of U.S. $ 35.— per troy ounce did not tally with the actual price of a troy ounce of gold, which namely amounted to almost $ 75.— on the free gold markets, of which those of India and Egypt were mentioned. Inasmuch as the British had considered this matter as particularly important, they had, so they intimated, submitted it to two of the most eminent economic experts of Great Britain viz. Sir Henry Clay of the University of Oxford and Mr. Thackstone "who is

Foreign Manager of the Midland Bank". The report continues: "We explained this problem to them, and I think I should here say we have always been extremely grateful for the great trouble they took in this matter, both being very busy men. But the only solution they were able to suggest was that the unit of limitation should be expressed in terms of what is known as the Final Act of the United Nations Monetary and Financial Conference at Bretton Woods. They said, if you express your unit of liability, your £ 100, in terms of, say, the dollar, and when you have to pay a claim you pay the equivalent of that dollar unit in your own currency, the rate of exchange being governed by Bretton Woods you will get as near uniformity of value in whatever country you happen to make your claim". The British Maritime Law Association, however, turned this solution down "as being impracticable and worse than impracticable—decidedly dangerous".

In Madrid and Brussels, as has been already stated above, the question did no more come up for discussion so explicitly. Nevertheless I would not, unlike the esteemed Counsel for the Appellant in the Cassation proceedings, venture to attach thereto the conclusion—by reason of the history of the formation of the Brussels Convention of 1957—that it was the intention of those drawing up the text, that in regard to a conversion as referred to in Article 3 sub-paragraph 6 of that Convention, it was the free market gold price and not the official gold price in accordance with Bretton Woods, which was the basis on which one proceeded. Taking a bird's eye view of that history I would rather think that the delegates at those Conferences (and I have now particularly those of Madrid and Brussels in mind) did not fully visualize the problem

and that they, to a greater or lesser degree conscious thereof, left it unsolved. In this connection it should not be overlooked that in the middle fifties the official gold price and the gold price on those of the free markets which were more within the standpoint of most of the delegates, happened in the actual fact not to diverge very much.

I would here refer to the summary at page 159 of "Die Goldmark te der Welt" by H. Bartels (1960). According to that summary the gold price of an ounce in U. S. $ in the years 1954 to 1958 inclusive moved near U. S. $ 35.—at the markets of e. g. Brussels, London, Milan, Paris, Tangier and Zurich. Only Bombay and Karachi were permanently higher than U. S. $ 50.—.

Many delegates will therefore probably not quite have visualized the problem, which had in fact been recognized by some of them. In addition thereto it has to be borne in mind that a vast majority of the delegates at the various conferences always consisted of lawyers who as such were not schooled to solve precarious economic and monetary world problems. I would here recall the opinion which I have mentioned above of the two eminent British economists.

Likewise there is no direct support to be found for the decision of the Arrondissements Court in the history of other Conventions in which a similar gold clause was inserted as in the Convention now under discussion; but no indication either that it should be qualified as wrong. On the contrary! In September 1955 a Conference took place in The Hague for the revision of the Warsaw Convention (1929), a Convention for the unification of cer-

tain provisions relating to International Transport by Air. (Edition Schuurman & Jordens: Code of Commerce, page 603).

By protocol dated the 28th September 1955 the fourth sub-paragraph of Article 22 was inter alia replaced. This sub-paragraph was originally reading:

"The figures set out above are deemed to relate to the French franc fixed at sixty five and a half milligrammes of gold of millesimal fineness nine hundred. They can in every national currency be converted in round figures". This fourth sub-paragraph of that Article has become the fifth sub-paragraph and now reads: "The figures given in this Article in francs are deemed to relate to a unit of currency fixed at sixty five and a half milligrammes of gold of millesimal fineness nine hundred. These figures can in every national currency be converted into round figures. The conversion of these figures into a national currency which is not based on gold shall in the event of legal proceedings be effected in accordance with the gold value of such a currency as at the date of the Judgment". It would seem to me that some indication is here indeed noticeable in the direction of the official gold parity of the national currency, the more so in view of the fact that in the report issued by the Chairman of the Netherlands Delegation the figures of the limitation of liability, increased at the Conference, are in every instance—albeit roughly—converted in accordance with the official gold parity of the Netherlands guilder; the figure of the limit fixed at 250,000 gold francs is put on a par with approximately Dfls. 62,000.— and the report furthermore states:

"The proposal adopted is acceptable to the Netherlands. A limitation of the liability to Dfls. 62,000.—is certainly not excessively high. . . ." The gold franc was in this conversion put at Dfls. 0.24. The value of that gold franc was Dfls. 0.240133 as appears from a letter from the Netherlands Bank dated the 8th July 1968 which is amongst the documents. Finally reference should here be made to the statistical schedule inserted on page 249 of the Volume Documents (Doc. 7686-LC/140) of the Conference Internationale de droit prive aerien, La Haye, septembre 1955, in which the conversion of the figure of the limitation was made in the currencies of about seventeen countries in accordance with the official rate of exchange; in a footnote it is pointed out that conversion in accordance with the free market gold price would result in a change in the figures shown.

It would seem to me that the solution which was given by the Arrondissements Court in the present case i. e. conversion in accordance with the official price of gold as at the 2nd May 1969, as nearly as possible approximates the intentions of the makers of the Brussels Convention. The aim of the Convention—as also follows from what I have briefly touched upon above with relation to the Protocol for amendment of the Warsaw Convention—was namely to arrive at a definite fixing of the figure of the limit to which the liability was restricted, in such manner that the said maximum figure would be acceptable to all the parties concerned and that this would in all the relative countries result in an equivalent right of recovery for creditors. Within this ground plan a link-up of the figure of the limitation of liability with the price of gold on the free market does not fit in, because that price,

in times of monetary unrest under the influence of speculative purchases, shows a tendency to rise to a considerably higher level than the delegates at the Conference will have visualized when fixing the figure of the limitation. Conversion of the figure of the limitation to the considerably higher level of the free market price would in an unacceptable manner have interfered with the often arduous negotiations which those delegates had to conduct in order to arrive at the fixing of the figure of the limitation of liability. This now specifically applies in the present instance where the figure of the limitation, calculated in accordance with the official price as at the 2nd May 1969, works namely out at the sum of Dfls. 555,515.—and in accordance with the free market price at Dfls. 705,788.67, so that the difference amounts to over Dfls. 150,000.—. It is not likely that such a fluctuation may be deemed to have been "hereinkalkuliert" (included) at the time of the making of the Convention, inasmuch as the tenor of the Convention is to arrive at a figure of the limitation which is uniform in point of time and place.

The view that the conversion of the gold franc should, as occasion arises, be effected in accordance with the official gold parity of the currency in question is shared by many of those who have occupied themselves with that problem. I may here mention: H. Drion "Limitation of Liabilities in International Air Law" (thesis 1954) on page 183; Schadee "Supplements" to Cleveringa's "Maritime Law" (1966) on page 21: Pineus "Limited Liability in Collision Cases" (1965) on page 39, though vaccillating: Collin "The use of a calculation-currency in modern Maritime Law" in the "Legal Weekly" (Rechtskundig Weekblad), 32nd Annual Volume (1969) on page 1443;

Knorr "Das Internationale Brusseler Uebereinkommen uber Schiffsglaubigerrechte von 1967 im kunftigen deutschen Recht" (thesis 1969), who takes the view (vide page 43), that "den Zielen des Haftungsabkommens diametral entgegenstehen wurde, wenn die obere Grenze der Reederhaftung in Abhangigkeit gebracht ware zu so unsicheren wirt-schaftlichen und politischen Elementen wie sie im freien Goldpreis enthalten sind" and finally Sotiropoulos in his book quoted by the "Arrondissements" Court in the Judgment appealed from. Nor do I want to fail to refer to the letter from Dr. Walter Muller of the 12th September 1969 to Respondent's Counsel in the Cassation proceedings, in which the former also declares himself in favour of the official gold price.

Dr. Muller's view is of particular importance because he was, as Swiss delegate, a party to the drawing up of the Convention with relation to the legal liability for damage caused by pollution through oil, Brussels 1969 (Trb. 1970 No. 196 and 1971 No. 70). In that Convention the limitation of liability is likewise expressed in gold (Poincare) francs. At the instance of that same Dr. Muller the word "officielle" was at the latest Plenary Session, added in Article VI sub-paragraph 9 after the word "valeur", after Dr. Muller had pointed out that there existed a difference between the official price of gold and the price of gold on the free market. Dr. Muller's proposal was accepted at that Session without any further comments. The clause in question reads: "Le franc mentionne dans cet article est une unite constituee par soixante-cinq milligrammes et demi d' or au titre de neuf cent milliemes de fin. Le montant mentionne au paragraphe I du present article sera converti dans la monnaie

nationale de l'Etat dans lequel le fonds doit etre constitue; la conversion s'effectuera suivant la valeur officielle de cette monnaie par rapport a l'unite definie cidessus a la date de constitution du fonds". As against the latter's opinion Prof. R. Jeanpretre (Professor a l'Universite de Neuchatel) in the Schweizerische Juristen-Zeitung (Annual Volume 65, 1969 on page 185), puts forward the point of view that the conversion of the gold franc should be effected in accordance with the price on the free market. Jeanpretre takes the view that the free market price will lead to the uniformity aimed at by the Convention. It would seem to me however that this view puts an undue strain on the actual situation. Firstly, the fluctuations of the price of gold on the free markets are not inconsiderable and secondly, there is at one and the same moment a difference—and at times even a fairly considerable difference—in the price of gold on the different gold markets. Even if it be assumed that the gold franc must be converted in accordance with the gold price on the free market then the surely very important question remains unanswered which free market to choose! The Netherlands delegate Van der Feltz made the following remark on the subject at the Conference in Antwerp: "Another possibility is that the Convention takes as the rate of exchange the average price of gold on the official gold market in London and New York." No further comments followed thereon but it is clear that Van der Feltz did realize that it would not suffice to refer to "the" free gold-market but that a specific market had of necessity to be referred to. Jeanpretre says in his Article quoted above:

"Nous arrivons ainsi a la conclusion que les unites de compte exprimees en or dans les conventions internation-

ales doivent etre' converties en francs suisses au cours de l'or sur le marche, sans egard a la parite prescrite par la loi. Pratiquement, on appliquerae la cours moyen de l' or sure le marche' de Zurich". Comprehensible in the case of a Swiss; but why Zurich and: the average of what? Uncertain elements which do not arise in the case of a conversion in accordance with the official price. Jeanpretre puts forward as an argument against the official price:

"Chaque Etat peut fixer a sa guise la parite-or de sa monnaie, sans egard a la valeur marchande de l'or". Again I feel that I would wish to place a questionmark against this argument. I am of the opinion that internationally there surely exist impediments with regard to amendments in the gold-parity of national currencies. As far as the Netherlands are concerned I would refer to the history of the formation of the Act with relation to the par value of the guilder. In the Memorandum in Reply (Annexure to the Record of the Proceedings of the Second Chamber of Parliament. Session 1962-1963/7074) the Minister of Finance wrote:

"An amendment of the par value is no matter which only effects our own country. The Netherlands are under an obligation to consult thereon with other countries in terms of the Convention relating to the International Monetary Fund, the Benelux Treaty, the Treaty with relation to the European Common Market (E. E. G.) and the Statute for the Kingdom of the Netherlands". It would seem to me that it can hardly be maintained that *our* Minister of Finance "peut fixer a sa guise la parite-or de sa monnaie". I therefore consider the point of view of Jeanpretre as untenable.

I am of the opinion that the "Arrondissements" Court has given a right decision in the Judgement appealed against with relation to the fourth sub-paragraph of Article 740 d of the Code of Commerce, and that for that reason the grounds of Cassation have unsuccessfully been put forward.

I would theerfore conclude that the Appeal be dismissed.

After having heard the parties:

After having heard the Advocate-General Berger, on behalf of the Solicitor-General, whose conclusion is to the effect that the appeal should be dismissed and that the Appellant in the proceedings for cassation should be ordered to pay costs of suit in those proceedings;

After having perused the documents;

WHEREAS the Judgement appealed against and the documents filed of record show:

that the Appellant in the proceedings for cassation—Hornlinie—by writ dated the 25th July 1969 sued the Respondent in the proceedings for cassation—hereinafter to be referred to as S.N.P.A.—in the Arrondissements Court at Rotterdam and claimed:

"1) a declaration of right to the effect that, when correctly applying the provisions of Article 740 d of the Code of Commerce, the amount to which S.N.P.A., when making payment in terms of the provisions of Article 740 d sub-paragraph 4 of the Code of Commerce, was entitled to limit its liability for the damage, ensuing from a collision which on the 27th October 1967 had occurred on the New Rotterdam Waterway between the Hornland and the Pres-

ident Pierre Angot, was as at the 2nd May 1969 to be put at Dfls. 705,788.67 or alternatively at such figure as would be arrived at when converting 2,313,360 of the francs referred to in the said Article in accordance with the price of the said franc, or alternatively at the price of 65.5 milligrammes of gold of millesimal fineness nine hundred as at the 2nd May 1969, having regard to the actual value of gold or alternatively to the value of gold on the free market as at the aforesaid date.

2) by Judgement, in so far as possible executable with immediate effect, to order S.N.P.A. to pay to Hornlinie against proper acquittance a sum of Dfls. 150,273.67, or alternatively the figure by which—when correctly applying Article 749 d sub-paragraph 4 of the Code of Commerce—the amount of the limited liability of S.N.P.A. by reason of the aforesaid exceeds an amount of Dfls. 555,515. —; to all of which is to be added interest at the rate of 5% per year from the 2nd May 1969 until the date of payment;

3) in that same Judgement to order S.N.P.A. to pay costs of suit.";

that after these claims had been contested by S.N.P.A. the "Arrondissements" Court, in its Judgement dated the 23rd March 1971, dismissed the claims put forward by Hornlinie, after having taken into consideration:

(then follows the full text of the Judgment delivered by the "Arrondissements" Court)

(here continues the text of the Decision given in the Cassation proceedings);

that by deed bearing date the 11th June 1971 the parties entered into an agreement to the effect that from

this Judgment an Appeal in Cassation would be noted by Hornlinie, thus by-passing any (other) Appeals;

WHEREAS

Hornlinie contests the Judgment of the Arrondissements Court on the following grounds of Cassation:

(then follows the grounds of Cassation in which it is asserted that the "Arrondissements" Court by its decision violated the Law)

(here continues the text of the Decision in the Cassation proceedings).

WHEREAS

these grounds of cassation raise the question in what manner the franc referred to in Article 740 d of the Code of Commerce has to be converted into Netherlands currency in accordance with the daily price in order to ascertain the amount to which the liability of the Shipowner and of the other persons mentioned in Article 740 a can be limited;

that the Arrondissements Court has based its decision on the view that, with regard to this conversion, one has to proceed on the basis of the parity of the Dutch guilder expressed in the weight of gold fixed by the Netherlands Government, as existing at the time of the conversion, whereas the grounds of appeal assert that one has to proceed on the basis of the quotation of gold on the free market, prevailing at that moment;

that Article 740 a to d inclusive were inserted in the Code of Commerce in order to give effect to the International Convention relating to the limitation of the liability

of Owners of sea-going ships, concluded in Brussels on the 10th October 1957;

that this Convention inter alia lays down in Article 3 sub-paragraph 6, of the French text: "Les montants mentionnes au paragraphe 1 du present article seront convertis dans la monnaie nationale de l'Etat dans lequel la limitation de la responsabilite est invoquee; la conversion s'effectuera suivant la valeur de cette monnaie par rapport a l'unite definie ci-dessus", and of the English text: "The amounts mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency by reference to the unit defined above";

that the said Article of the Convention, in so far as here relevant, has as follows been rendered by the Netherlands Legislator in Article 740 d sub-paragraph 4 of the Code of Commerce: "The said franc shall be converted into Netherlands currency in accordance with the daily price"; that there is no reason to assume that the Legislator by so rendering it in that Code, would have meant a departure in a material sense from the text of the Convention;

that Article 3 sub-paragraph 6 of the Convention by mentioning a conversion on the basis of the value of the national currency and not on the basis of the value of gold, lends support to the view that, when converting the franc into Netherlands currency, one has to proceed on the basis of the official parity of the guilder expressed in gold and not on the basis of the market price of gold;

that this view is also supported by the fact that the States which were parties to the formation of the Conven-

tion, were for the major part also parties to the Bretton Woods Convention, and that there existed certain arrangements between those States within the frame-work of the latter Convention with regard to the mutual relationships between their currencies, whereby those currencies were directly or indirectly expressed in a certain weight of gold;

that furthermore it is to be observed that even though the franc mentioned in the Convention was no longer, at the time of the conclusion of the Convention, an existing national currency but nothing else than a unit of calculation, the fact that that unit of calculation was not sought in a specific weight in gold but in a currency with a certain weight of gold, indicates that when choosing that unit of calculation it was the monetary role of gold, rather than the trading value of that metal, which one had in mind;

that the wording of the said article of the Convention and of the Netherelands Enactment based thereon, are, however, not of such a nature that they would even then inevitably lead to the view mentioned above, if the history or the tenor of the Convention should clearly plead in favour of placing the construction on the Convention which has been asserted in the grounds of Cassation, or if the contested construction would lead to consequences which are difficult to accept and which would be obviated in the event of the other construction being placed thereon;

that in so far as the history of the formation of the Convention is concerned, there is nothing to show that the diplomatic conference at which the text of the Convention was fixed in 1957—apart from the opinions of individual delegates—quite visualized the problem in question, let alone that the conference was desirous of making a deci-

sion on the subject; neither does the history of Article 740 d of the Code of Commerce afford any indication that the Netherlands Legislator held a particular view on the subject:

that, in so far as the tenor of Article 3 sub-paragraph 6 of the Convention is concerned, the choice of a fictitious currency expressed in a weight in gold as unit of calculation instead of any existing national currency, was prompted by the wish not to link-up the fate of the Convention, —in so far as the height of the amounts, to which the liability could be limited, is concerned—to the devaluations and revaluations of a particular currency;

that furthermore in that same article the date of converting the franc into the currency of the country in which the limitation of liability is invoked, is prescribed in order to obviate that the conversion should in advance be fixed in the various national legislations whereby namely the uniformity aimed at by the Convention in the limitation of liability would be defeated as soon as money were devalued or revalued in any one or more of those countries;

that in both respects mentioned here no less justice would be done to the tenor of Article 3 sub-paragraph 6 of the Convention if the view be adopted which is contested by the grounds of Cassation than if the view be adopted on which the grounds of Cassation are based;

that in neither of the two views the result is achieved that the value expressed in purchasing power of the amounts to which liability can be limited, remains equal; that a conversion on the basis of the gold-price on the free market will admittedly in many cases lead to higher amounts than a conversion on the basis of the official par

value expressed in gold of the various national currencies, but that these variations need not necessarily link-up with the purchasing power of the money into which the amount of the limitation of liability must be converted, inasmuch as they frequently will result from causes of a speculative and international-monetary nature;

that on the other hand, as long as international arrangements exist between a substantial majority of the countries which are parties to the Convention, regarding the mutual relations between their currencies whereby a joint valuation of gold is the basis proceeded from, the general tenor of the Convention—viz. the promotion of uniformity in the national legislations with relation to the limitation of the liability of the ship-owner in such a manner that the application of those legal Enactments may lead, as much as possible, to equal results—is better achieved by a rating of the franc which links-up with those international monetary arrangements than by a conversion on the basis of the daily prices of gold which are sometimes widely divergent and vary on the various free gold markets;

that furthermore, in so far as the practical consequences are concerned of the view advocated in the grounds of Cassation, a choice for the conversion of the franc on the basis of the prices of gold on the free market would, in view of the fluctuating character of these prices, lead to the rather unsatisfactory result that the height of the amount of the limited liability would vary according to the day on which the debtor makes this amount available or gives security therefore;

that in view of what has been said above justice can best be done to the tenor of Article 740 d sub-paragraph

4 of the Code of Commerce by the conversion of the franc referred to therein into Netherlands currency, on the basis of the gold-rate of the guilder as fixed by Law;

that this proposition is in no way altered by the disparity, mentioned at the end of the grounds of Cassation, between on the one hand "the official gold-price" and on the other hand the price for which gold changed hands on the free gold-market, which disparity came into existence since March 1968, as a result of the decisions referred to in the grounds of Cassation, of the countries, which until then had formed the so-called gold pool;

that when the said disparity came into existence this did not have the result that the "official gold-price" thereby lost its significance nor that—bearing in mind the aims of the Convention—it ceased to be fit to serve as a uniform standard for the conversion of the gold franc into national currencies;

that this is corroborated by the fact that in 1969 the diplomatic conference which laid down the text of the Convention regarding the legal liability for damage caused by pollution through oil (trb. 1970, No. 196; and 1971, No. 70) and which adopted—with regard to the calculation of the limitation of liability—the same franc as was also used as a calculating unit in the Convention of 1957, did explicitly express a view on the question now before this Honourable Court and adopted the official value of the national currency in relation to the franc as the basis for conversion:

NOW THEREFORE the grounds of Cassation have unsuccessfully been put forward.

Dismisses the Appeal.

EXHIBIT N—FOREIGN DECISION OF *PAKISTAN INTERNATIONAL AIRLINES V. COMPAGNIE AIR INTER S. A.* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM FRENCH

THE FACTS:

The dispute relates to the carriage by air of 51 packages of electronic equipment from HONG KONG to MARSEILLES. According to the air waybill made out on April 6, 1974 by PIA (Pakistan International Airlines), the consignor was the company AMERICAN INTERNATIONAL FREIGHT and the consignee was the company SERRES ET PILAIRE. The forwarding of the cargo was carried out as follows:

PIA entrusted the 51 packages to AUSTRIAN AIR TRANSPORT for the journey HONG KONG—AMSTERDAM. KLM acting as PIA's agent alleges that it received only 45 packages which it carried to ORLY, and handed over to AIR INTER which had them sent, not by air but by road, to MARSEILLES by TRANSPORT ET GROUPAGES DE FRANCE. At arrival in MARSEILLES, the insurance company HELVETIA, subrogated to the consignee's rights, was forced to record that the consignee received only 44 packages. It follows that 6 packages were lost between HONG KONG and AMSTERDAM, or in AMSTERDAM, and that a seventh package was lost between AMSTERDAM and MARSEILLES.

The insurance company HELVETIA, subrogated to the consignee's rights, issued a writ against AIR INTER, and this latter summoned KLM, PIA and TRANSPORT ET GROUPAGE DE FRANCE in guarantee. On appeal,

AUSTRIAN AIR TRANSPORT was summoned as third party by PIA.

ARGUMENTS OF THE PARTIES:

The aviation company P. I. A. says that it did indeed make out on April 6, 1974, an air waybill for the carriage to MARSEILLES of the electronic equipment in question, but that it had in fact entrusted the first stage of the carriage by air, between HONG KONG and AMSTERDAM, to the company AUSTRIAN AIR TRANSPORT to which the 51 packages were handed over; that the company KLM which took charge of the carriage between AMSTERDAM and ORLY reported in its manifest of April 16, 1974, that it had received and delivered to AIR INTER only 45 packages; that the final consignee received only 44 packages; and that together with KLM it was ordered to relieve and guarantee AIR INTER from the responsibility for the loss of 6 packages within the limits of the Warsaw Convention. As the action must be brought within a period of two years as provided by article 29 of the Warsaw Convention, AIR INTER's action must be declared prescribed further, and in any event, AIR INTER was to summon AUSTRIAN AIR TRANSPORT which had alone carried out the transportation. PIA thus requires the Court to declare AIR INTER debarred, subsidiarily to say that PIA is exonerated, and subsidiarily to order AUSTRIAN AIR TRANSPORT to relieve and guarantee PIA from any responsibility, to order AIR INTER to pay the costs and FF3000 on the basis of article 700 of the New Code of Civil Procedure.

The company AUSTRIAN AIR TRANSPORT summoned by PIA as third party replies that this cause of

action is extinguished as a five-year delay has elapsed since the delivery of the cargo, and furthermore that the action is not admissible as it was introduced against AUSTRIAN AIR TRANSPORT for the first time at the appeal stage when the situation referred to was already in existence when the summons was served. Subsidiarily, AUSTRIAN AIR TRANSPORT argues that the damage report of April 15 mentions a loss on a flight taking place on April 14 when the packages are alleged to have been carried on April 6; that no manifest showing that KLM had received only 45 packages has been produced in the hearing, the manifest made out on April 16 between KLM and AIR INTER indicating that the loss occurred between AMSTERDAM and ORLY. AUSTRIAN AIR TRANSPORT concludes that the demand should be said inacceptable and in any case ill-founded, and the company PIA ordered to pay the costs and to pay AUSTRIAN AIR TRANSPORT FF3000 by virtue of the provisions of article 700 of the New Code of Civil Procedure.

The companies KLM ask to be exonerated and for the decision to be reversed insofar as they were ordered to relieve and guarantee AIR INTER. In reply to the pleadings of AUSTRIAN AIR TRANSPORT which availed itself of article 29 of the Warsaw Convention to have the action struck out in its favor, KLM says that those provisions do not apply to relations among airlines.

The company HELVETIA SAINT GALL, basing itself on the international agreements prohibiting references of currencies to gold, announces that the Poincare franc must be given from now on a value equal to FF1 instead of FFO.36. It requests thus that the Court uphold the de-

cision in its principle and that the order to pay 13,500 francs as defined by the Warsaw Convention be construed as meaning an order to pay FF13,500 of today. It further requires that AIR INTER be ordered to pay HELVETIA the sums of FF1000 for abuse of the process of law and FF1000 by virtue of article 700 of the New Code of Civil Procedure.

For its part, the company AIR INTER means to remind the Court that as a result of the transport manifest of April 16, 1974 made out at the time of delivery of the cargo it received only 45 packages from KLM; that it thus falls to the Court to uphold the decision insofar as it ordered KLM to guarantee AIR INTER in respect of the payments to be made. As the third party action against TRANSPORT ET GROUPAGES DE FRANCE could be considered prescribed by virtue of the provisions of article 108 of the Code of Commerce, AIR INTER nevertheless requires that the decision should be reversed insofar as it ordered AIR INTER to pay FF500 by virtue of the provisions of article 700 of the New Code of Civil Procedure.

AIR INTER also argues that its liability may not be extended beyond the limits provided in article 22 of the Warsaw Convention as amended by the Hague protocol, namely 250 Poincare francs per carried kilogram. The assertion of HELVETIA to obtain that the order to pay 13,500 Poincare francs should from now on mean FF13,-500 of today proceeds from a lack of comprehension of the scope of the international monetary agreements which do not concern the relation of moneys of payment, or of moneys of account, between themselves.

The company TRANSPORT ET GROUPAGE DE FRANCE argues that having made a contract of carriage by road with AIR INTER, the third party action against it is prescribed by virtue of the Code of Commerce, article 108 (1) and (4). It concludes that the decision be upheld with the addendum that AIR INTER be ordered to pay it FF3000 by virtue of article 700.

ON THE PRINCIPAL DEMAND:

Whereas several carriers cooperated in the execution of an international carriage by air, from HONG KONG to MARSEILLES, considered as a single operation, the last carrier had to assume responsibility in relation to the consignee for any damage occurring during the said carriage;

That it is thus advisedly that HELVETIA SAINT GALL subrogated to the rights of the consignee summoned AIR INTER by writ dated April 15, 1976; that in any case this latter no longer contest the justification of this action as it concludes for the decision to be upheld insofar as it ordered it to pay 13,500 francs as defined by the Warsaw Convention;

Whereas however on appeal HELVETIA avails itself of the prohibition to refer to gold in international monetary agreements to argue that the Poincare franc must now be given a value equal to the present day franc and that the order made in first instance to pay 13,500 francs 'as defined by the Warsaw Convention' must be construed as an order to pay FF13,500 of today;

But whereas the agreements known as the Jamaica Agreements to which HELVETIA implicitly refers have

not been ratified by the Parliament and presently do not constitute an international treaty binding France; that the only legal document to consider could only be the second amendment to the By-laws of the International Monetary Fund which prohibits the fixing of a gold parity as a denominator of the national currency, but that that provision does not intend to prohibit all national regulations which institute, save for exchange regulations, a relation between gold and the national currency; that the said amendment came into force on April 1, 1978 and would be without effect on the contract of carriage made out in April 1974;

That as it is a matter to convert a money of account to a money of payment, article 22 of the Warsaw Convention must be applied according to the equivalence of the Poincare franc fixed by the governmental declaration of August 10, 1969;

That it is appropriate to confirm the judgment in that it ordered AIR INTER to pay HELVETIA the sum of 13,500 francs as defined by the Warsaw Convention, and the sum of FF500 to compensate for the loss properly assessed;

That the Court also thinks it equitable to order AIR INTER to pay HELVETIA the sum of FF1000 on account of justified costs set forth by HELVETIA and not to be repeated in the costs.

That as HELVETIA does not prove the abusive character of the appeal, which in any case was justified, there is cause to declare it ill-founded in its demand for damages on this point.

ON THE THIRD PARTY APPEALS:

Whereas AIR INTER summoned KLM and PIA as third parties, and PIA in its turn summoned AUSTRIAN AIR TRANSPORT as third party at the appeal stage;

Whereas the company GENERAL ELECTRONICS whose head office is in HONG KONG had received an order for electronic equipment from the company SERRES ET PILAIRE of MARSEILLES and entrusted the carriage to PIA; that the consignment consisted of 51 packages of a total weight of 424 kilograms and was taken in by air waybill dated April 6, 1974;

Whereas after making out the AWB, PIA had the consignment carried by AUSTRIAN AIR TRANSPORT on that same day as it appears from the exhibits; that it has thus implicated AUSTRIAN AIR TRANSPORT so that it should subsidiarily be ordered to relieve PIA and to guarantee it against any order to pay;

Whereas AUSTRIAN AIR TRANSPORT maintains that this third party intervention is not admissible and deprives it of the double degree of jurisdiction when no new fact has intervened since the institution of the proceedings.

But whereas neither one nor the other of these parties was present in the first instance and that all other companies having participated in this international carriage are represented in appeal, it would be contrary to the good administration of justice to compel PIA to have the dispute re-examined; that there is thus cause to say that the intervention is admissible and to dismiss the argument of extinguishment as the provisions of article 29

of the Warsaw Convention only regulate the relations between carriers and users;

Whereas AUSTRIAN AIR TRANSPORT handed over the cargo in AMSTERDAM to KLM which forwarded it to ORLY where it was handed over to AIR INTER;

Whereas it appears from the exhibits:

—that 51 packages were taken in charge in HONG KONG by AUSTRIAN AIR TRANSPORT which handed them over to KLM in AMSTERDAM;

—that KLM made no reservation when the packages were received;

—that KLM waited until April 16, 1974 to make out in ORLY a document called "AIR CARGO TRANSFER MANIFEST" showing that six packages had been lost as it indicated that 45 packages were being delivered to AIR INTER;

—that KLM proves this loss by producing another document called "damage report" and dated April 15, 1974 indicating that the damage occurred through warehouse theft;

Whereas KLM does not dispute that it handed over to AIR INTER only 45 packages and cannot prove that the loss is the responsibility of AUSTRIAN AIR TRANSPORT, it will thus have to relieve and guarantee AIR INTER up to the value computed on the basis of the weight of 6 packages at a price of FF250 per kg, as defined by the Warsaw Convention.

That in consequence PIA and AUSTRIAN AIR TRANSPORT must be exonerated;

That no consideration of equity justifies the allocation of damages to these two companies on the basis of article 700 of the New Code of Civil Procedure and that they should thus be nonsuited on this point;

Whereas a seventh package was lost between ORLY and MARIGNANE [MARSEILLES AIRPORT] during the carriage undertaken by TRANSPORT ET GROUPAGES; that AIR INTER, considering that its action against this carrier was indeed prescribed in application of the provisions of article 108 of the Code of Commerce, asked for the decision to be reversed only insofar as it ordered AIR INTER to pay TRANSPORT ET GROUPAGES the sum of FF500 by application of the provisions of article 700 of the New Code of Civil Procedure.

Whereas AIR INTER's action does not present an abusive character and in view of the circumstances of the case, no consideration of equity justifies the allocation of damages to TRANSPORT ET GROUPAGES insofar as non-repeatable costs are concerned, that there is thus cause to reverse under this head;

ON THESE GROUNDS,
THE COURT,

Deciding on a commercial matter; publicly and after full argument on all sides.

On the form, declares admissible the appeals made by PIA and AIR INTER and the summoning of AUSTRIAN AIR TRANSPORT to appear,

On the content, on the principal claim made by HELVETIA SAINT GALL:

Upholds the referred decision.

And adds that AIR INTER is ordered to pay HELVETIA the sum of one thousand francs (FF 1000) in application of the provisions of article 700 of the New Code of Civil Procedure.

On the third party appeals:

Unsuits AIR INTER of its appeal in guarantee against PAKISTAN AIRLINES,

Upholds the decision for the rest,

Exonerates AUSTRIAN AIR TRANSPORT,

On the counter claim made by TRANSPORT ET GROUPAGES DE FRANCE:

Reverses the decision insofar as it allocated to this company a sum of five hundred francs (FF500) on the basis of article 700 of the New Code of Civil Procedure,

Deciding again on this count, unsuits TRANSPORT ET GROUPAGES DE FRANCE,

Unsuits all parties of any other and contrary conclusions and claims,

Orders AIR INTER to bear the costs of appeal which can be directly recovered from it by Maitre AUBE-MARTIN, SCP ROUGON TOUBOUL, SCP ERMENEUX-MANCINI, SCP SIDER, Maitre GIACOMETTI, substitute for Maitre BOURY, Attorneys, insofar as they paid them in advance without receiving a deposit.

(Signature) **(Signature)**

GIRAUD, **TOMASINI,**

Certified true copy
The Chief Clerk of the Court
(Signature)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Styles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT O—FOREIGN DECISION OF *CHAMIE V. EGYPTAIR* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM FRENCH

General Roll No. C 00249

Further to an appeal from a judgment by the Tribunal de Grande Instance, Part 7, of 10/6/78.

After full argument on both sides.

Judgment on the merits.

JUDICIAL ASSISTANCE

Admission of
in favor of

Date of closure of proceedings: 10/9/79

COURT OF APPEALS OF PARIS
Part 5, Section C
RULING ON JANUARY 31, 1980
(No. , pages)

PARTIES TO THE SUIT

1°/ *EGYPTAIR* Company, whose main office is at 1 bis, rue Auber, Paris 9.

Appellant and respondent in cross-appeal represented by M. TEYTAUD, Attorney, assisted by Maitre de Geuffre de la Pradelle, Esq.

2°/ Mrs. Lucia *CHAMIE*, nee JAFALIAN, residing at VALENCE (Drome), 30 Alee Zamenoff.

Respondent and appellant in cross-appeal represented by SCP GAULTIER, assisted by Maitre M. THORNE, Attorney.

COMPOSITION OF THE COURT

During the hearing and consultation, Chief Judge: Mr. GENDRE. Associate Judges: Messrs. FOURET and AYDALOT.

SECRETARY AND CLERK OF THE COURT:

Mrs. LACHAUX

OFFICE OF THE PUBLIC PROSECUTOR:

Represented by Mr. ECOUTIN, Attorney General, who stated his recommendations.

HEARING:

Hearings in open court of December 6 and 18, 1979.

RULING:

After hearing full arguments on both sides. Pronounced publicly by Mr. GENDRE, Chief Judge, who

signed the record along with Mrs. LACHAUX, Secretary and Clerk of the Court.

THE COURT, ruling on the appeal by the Egyptian Company "Egyptair" to review the judgment of the Tribunal de Grande Instance of Paris rendered on 10/6/1978, ordering Egyptair to pay Lucia CHAMIE nee JAFALIAN the equivalent in French francs of 9,517 Lebanese pounds, according to the rate of the Paris Stock Exchange on this date, with interest at the legal rate reckoned from this same day, as well as the sum of 700 francs and 2,000 francs, as well as costs.

Together with the cross-appeal by Lucia CHAMIE requesting that the Lebanese pound be evaluated as of 8/26/76, the legal interest be calculated from that same date, and that EGYPTAIR be ordered to pay her 3,700 francs in damages and 8,000 francs pursuant to Article 700 of the new Code of Civil Procedure.

The facts of the case and the Procedure were set forth by the Tribunal. It suffices to recall that this litigation concerns indemnification for 50 kilograms of luggage comprised of three suitcases belonging to Mrs. Lucia CHAMIE, which were lost in the course of the EGYPTAIR flight of 8/26/1976 between Damascus and Paris, via Cairo. She evaluated the sustained loss at 9,517 Lebanese pounds, but was not able to obtain payment. The airline, which acknowledged its responsibility, only offered an indemnity calculated at $20 (US) per kilogram, that is 4,900 French francs, by invoking the provisions of article 22 of the Warsaw Convention.

On the summons and complaint of CHAMIE, who maintained that the indemnification provided by article 22

of the Warsaw Convention was calculated in monetary units based on gold at the rate of 250 francs per kilogram, the Tribunal estimated that the conversion of the indemnity provided by this article into French currency should be made according to the value of gold on the open market of the Paris Stock Exchange for international bullion on the day of its judgment.

The company, EGYPTAIR, contests this interpretation by asserting that article 22 provides for a ceiling which limits damages for loss of baggage by weight, except when the consigners prove the real value of their baggage according to the general law; and that, since at the time of the signing of the Warsaw Convention in 1929 the national currencies of the contracting countries had a gold standard, with an official rate, specifically in France for the Franc Poincare, this rate was different from that of the open market, fluctuating and uncertain, and subject to speculation by private individuals to the point where one could witness "skyrocketing gold prices." This is contrary to the intention of the Convention's contracting parties, which was to refer to a constant monetary value.

The appellant company invokes the resolution of the Legal Committee of the International Civil Aviation Organization (I.C.A.O.), an organization attached to the United Nations, which in October 1974 deemed that the conversion of currencies fixed in Francs Poincare in the Warsaw Convention into national currencies was not to be effected on the basis of the gold price on the open market. EGYPTAIR furthermore invokes the BRETTON WOODS agreements and particularly the Jamaica agreements of 1974 which, by amending the constitution and by-

laws of the International Monetary Fund, severed the connection of the currencies of the member states to the gold standard; and maintains that these accords could not have had any effect on the application of article 22 of the Warsaw Convention for which, with respect to the French franc, it is necessary to adopt the last gold reference resulting from the government declaration of 8/10/1969 which fixed the value of the franc at 0.3680 milligrams of gold; it therefore offers a sum of less than 100 francs per kilogram and a total indemnity of 4,900 francs for the loss of the 50 kilograms of luggage. The appellant adds that Mrs. CHAMIE cannot claim damages other than those provided by the Convention, with the exception of the court fees and costs.

Mrs. CHAMIE, a Lebanese national, requests that the decision be affirmed with regard to the principal claim, that the conversion of the indemnity under the Convention must be effected according to the gold value of the French franc on the open gold market. She requests that the sum of 9,517 Lebanese pounds, the amount of which is not contested, be evaluated in francs on the date of the loss of her luggage, 8/26/1976, and be awarded to her in its entirety, since the limit provided for in article 22 was not reached.

Furthermore, she asks for incidental damages: a trip from Valence to Paris imposed by EGYPTAIR for 700 francs for the purpose of discussing her claim, 3,000 francs in damages for the prejudicial attitude of the carrier during a three-year period, and 8,000 francs pursuant to article 700 of the new Code of Civil Procedure.

The Attorney General has presented his observations. He has examined the legal problem put before the Court

by successively rejecting different methods for the calculation of damages because of the elimination of any reference to gold for the convertibility of the various national currencies, and specifically because of the non-appearance of the parity of the French franc with a certain quantity of gold and of the determination of an official rate for gold different from its price on the open market. He therefore eliminated: (1) the reinstitution of the old system of conversion by reference to the official price of gold in its definition of the French franc after the devaluation of 1969; (2) reference to gold on the open market; (3) the application of a substitute index; (4) the calculation of a ceiling with reference to a foreign currency, such as the US dollar. He proposed to the Court that it confine itself to the rules of general law in matters of determining damages and to avoid the extravagant consequences which would result from the application of the open market price of gold to the limitation of liability of the air carrier, a standard subject to speculation.

THIS HAVING BEEN SET FORTH:

Whereas, the Warsaw Convention of 10/12/1929 relating to international air transportation, modified by the Hague Protocol of 8/3/1963 makes the air carrier liable for damages sustained in the case of lost checked baggage when the event causing such loss occurs during air transportation;

That it is an established fact that the luggage checked by Mrs. CHAMIE with a total weight of 50 kilograms comprised of three suitcases was lost on flight No. 923 of 8/26/1976 on an EGYPTAIR aircraft between Damascus

and Paris, via Cairo, and that there was no declaration of value;

Whereas article 22 of the Warsaw Convention provides that, in the transportation of checked baggage, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, barring a special declaration of the value at delivery . . . that in the case of loss . . . only the total weight of the lost item(s) of baggage is taken into consideration to determine the limit of liability of the carrier, . . . that the fixed limits do not have the effect of removing from the Court the right also to award, in conformity with the law, a sum which corresponds to all or part of the expenses and other fees of the proceedings as shall be shown by plaintiff . . . ;

That paragraph 5 of article 22 specifies: "The sums stated in francs in this article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of these sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment;"

Whereas this text defines a unit of account in which the rate, clearly established with reference to a quantity of gold, gives it the nature of a universal unit of constant value which must serve as a reference at an identical level in all the signatory countries;

That the conversion of fixed sums in monetary units of account into national currencies which must be effected, in the case of judicial proceedings and barring a gold cur-

rency, "according to the gold value of such currencies at the date of the judgment," which date was added to paragraph 5 of article 22 by the Hague Protocol of 8/3/1963, must necessarily take into account the change in national currencies in terms of worldwide inflation;

That in 1929, the conversion of Warsaw francs was effected in parity with the Franc Poincare which was also defined as 65.5 milligrams of gold at a standard of 900/1000 degrees of fineness;

That following the successive devaluations of the French franc and the change from the old franc to the new franc dating from 1/1/1960, the French governmental declaration of 8/10/1969 defined for the last time the new parity of the franc in relation to gold at 0.368 milligrams, which made it possible to present before a French judge a conversion of 92.20 francs for 250 Warsaw monetary units per kilogram of checked baggage;

Whereas, at the time of the drafting of the Guatemala Protocol of March 8, 1971, relative to air transportation, it was clearly agreed that the new ceiling on the carrier's liability would be fixed in monetary units of Poincare francs according to the official gold parity and not according to the value of the metal on the open market; that such was also the case with respect to the drafting of other international conventions on transportation;

That following the Smithsonian Institute agreement of 12/18/1971, the International Monetary Fund, in decision No. 3963, created, for certain of its members which did not want the system of official parities, new rates, called central rates, relating to gold by a different method than that foreseen by the agreements of BRETTON

WOODS, at $35 US an ounce of fine gold following the cessation of the convertibility into gold of US dollars; these central rates were not applied in France where the currency had been on an official parity with gold since 1969;

That at the Montreal Conference on Aeronautics Law of September 1975, the national representatives envisaged the substitution of special drawing rights (S.D.R.) for the Franc Poincare, but could not arrive at a general agreement on the definition of a universal unit of constant value which would serve as a reference for the expression of monetary sums in international conventions, even though the Legal Committee of the I.C.A.O. had published in October 1974 a resolution relative to the conversion of the Franc Poincare into national currency in the Warsaw and Rome Conventions, eliminating the necessity of taking into account the price of gold on the free market;

That it follows that the monetary unit of reference of the Warsaw franc equal to the Franc Poincare of 1929 was maintained in article 22 while the conversion of this unit of account was effected according to the gold value of the franc resulting from the devaluation of 1969;

Whereas the Jamaica agreements, which France signed, eliminated as of April 1, 1978 all reference to gold for the determination of the official value of national currencies and, therefore, for the present French franc;

That it is therefore necessary to note that since this date, and specifically on October 6, 1978, the date of the judgment, the conversion of the units of account referred to at the end of article 22(5) according to the gold value of the French franc has become impossible;

Whereas, the Court may not arbitrarily extend beyond the 1st of April 1978 the official parity of the franc with the quantity of gold defined in 1969, since this definition has been eliminated by international agreements;

That the Court also may not refer to the variation of a price index in order to determine the gold value of the franc at the date of the judgment without causing this value to vary according to the subjective choice of this index;

Whereas, if it is true that the tickets issued by the airline companies, and in particular by EGYPTAIR, contain a clause limiting the liability of the carrier for loss of checked baggage to $20 (US) per kilogram during international trips; and that settlements occur on this basis between companies and passengers suffering these losses, such a clause, contrary to the Warsaw Convention, is illegal by reason of substituting for the system of calculation of article 22 of limited liability determined by reference to a foreign currency not convertible into gold, unilaterally chosen by the carriers;

Whereas, the freedom of the gold market, especially since 1968, having left to private parties the determination of the price of this metal according to the fluctuation of supply and demand within each state, tied to the gold pool, has determined a gold value different from its official parity in relation to national currencies, which value varies according to the place, the time, the economic or political circumstances, or mere speculation;

That the price of gold on the free market cannot be a standard of reference for the convertibility into national currencies of Warsaw Convention units of account, since

the contracting parties desired that the conversion be effected according to the gold value of currencies officially defined by each member country, which was allowed in particular for the USSR, a signatory to the Convention, and not according to the price of the precious metal on the various national markets; that this was in fact the holding of the French courts up to April 1978 on the question of limitation of liability of international air carriers which determined the gold value of the French franc according to the definition resulting from the 1969 devaluation at 0.368 grams of pure gold with 900/1000 degrees of purity, corresponding to 92.20 francs per kilogram for 250 Warsaw units;

Whereas, the disappearance of the official parity of the franc with a quantity of gold following the Jamaica agreements has made it impossible since April 1978 to use, for the conversion of the monetary unit of account of Warsaw, the reference to the value of gold on the open market of the Paris Stock Exchange, which has no official role in the international monetary system and does not correspond to an official price defined by the French government and is merely the result of transactions of a private nature on a non-competitive market, tied to speculation in the precious metal, without any reference to the French currency which is solely recognized on the international level;

That while since April 1978, the Bank of France has revalued its inventory of gold, this revaluation accomplished according to its own particular criteria (6.5 per semester, it seems) would not be taken into account in determining the gold value of the present officially unconvertible French franc;

That the Tribunal therefore erred in considering that the conversion or the Warsaw units of account should be effected according to the international value of bullion on the Paris Market on 10/6/1978;

Whereas, the court could not refuse to render a decision under the pretext of silence, obscurity, or insufficiency of the law;

Whereas, to make an evaluation of damages according to the rules of French general national law in view of the evidence presented in the case in point, namely a simple declaration of a list of lost objects contained in three suitcases and evaluated by the plaintiff, would be contrary to the rule stated by the Warsaw Convention, which in article 22 determined the limit of liability of the air carrier according to rules based upon the total weight of the lost baggage, and to the value per kilogram of the lost baggage, at 250 francs per kilogram, Warsaw francs, being equal to the Franc Poincare of 1929;

That, as the global limit could not be exceeded except in the case of a special declaration of value made at the time the baggage was checked, the evaluation under general law may well exceed this limit;

Whereas, the Court was obliged to take note of the fact that since April 1, 1978, the disappearance of the official parity of the franc with gold results in the impossibility of applying the rule of the conversion of the units of account into French national currency, for which there no longer exists an official gold value;

That since the conversion rule of article 22 constitutes a veritable gold clause, changing according to worldwide

inflation and successive official devaluations of national currencies of the Member States of the Convention, it therefore becomes inapplicable, in the international air transport contract, just as the gold clause has disappeared in contracts under national law, for reasons crucial to the defense of the national currency;

That consequently, the present French franc, successor to the Franc Poincare of 1926, with a gold weight identical to that of the Warsaw franc unit of account, successor to the old franc, and successor to the new franc after 1/1/1960, defined by a gold weight after the devaluation of 1969, having lost since April 1978 all reference to a gold value and being recognized as a currency of payment for international obligations, can alone be used for conversion into national currency of the Warsaw Convention francs, and must be recognized as having a value equal to the French franc of 1926 on the international level, but without a reference to gold;

That the loss of a kilogram of baggage must therefore be redressed by a global indemnity equal to 250 current French francs for 250 francs, Warsaw units;

That, therefore, the limit of liability of EGYPTAIR for the 50 kilograms of lost baggage established as of the day of the judgment of 10/6/1978 is the sum of 12,500 francs;

Whereas, Mr. [sic] CHAMIE has no basis on which to demand of a French court a judgment against the air carrier for the payment of the equivalent in French francs of 9,517 Lebanese pounds on 8/26/1976, the date of the loss, but only for the value of her baggage in French national currency on the date of the judgment;

That according to the official rate of exchange in October 1978 the Lebanese pound was worth 1.347 francs and the claim must be evaluated at 12,829.39 francs, a sum exceeding the limit of liability;

That the amount of the indemnity for lost baggage must therefore be determined at 12,500 francs to be paid by EGYPTAIR with interest at the legal rate from the date of the summons and complaint 2/28/1978;

Whereas, on the claim for incidental damages, article 22of the Warsaw Convention is exclusive of all other indemnities, with the exception of the costs of the trial;

Furthermore, no proof was given as to the existence either of a direct and certain connection between the voyage from Valence to Paris and the loss of the luggage in this case, nor as to bad faith on the part of EGYPTAIR in conduct of the negotiations to settle the difficulties arising from the baggage loss and the interpretation of article 22 of the Warsaw Convention;

That the delay in the payment is redressed by the granting of legal interest;

That is follows that the judgment which upheld the claim for damages should be reversed, and the cross appeal dismissed on this point;

Whereas, applying the provisions of Article 700 of the new Code of Civil Procedure, it is equitable to grant, in this regard, to Mrs. CHAMIE, a Lebanese refugee who lost her baggage and was obliged to sue and bring an appeal in order to obtain indemnification for the damage sustained, the sum of 3,000 francs for all fees connected with the proceedings which are not included in the costs;

Whereas the expenses in the first instance and of the appeal must be borne by EGYPTAIR whose argument was rejected and whose offer of 4,900 francs was not satisfactory;

ON THESE GROUNDS, THE COURT

Admits the appeal of the EGYPTAIR Co. and the cross appeal of Lucie CHAMIE nee JAVALIAN;

REVERSES the judgment appealed and, redeciding the case,

Orders EGYPTAIR to pay Mrs. CHAMIE:

1°/ for loss of 50 kg of checked baggage the sum of 12,500 frs. with interest at the legal rate from 2/28/1978;

2°/ on the basis of article 700 of the new Code of Civil Procedure the sum of 3,000 frs.

Rejects all broader or contrary demands by the parties.

Directs EGYPTAIR to pay the costs of the first instance and appeal.

SCP GAULTIER, solicitors, may recover directly the expenses of the appeal for which it made an advance without having received a deposit.

(illegible)

FOR TRUE AND AUTHENTIC COPY

The Clerk of the Court,
(Signature)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Stiles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT A—EXCERPT FROM WARSAW CONVENTION CONFERENCE MINUTES ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

SECOND
INTERNATIONAL CONFERENCE
ON
PRIVATE AERONAUTICAL LAW

October 4-12, 1929

Warsaw

MINUTES

Translated by: Robert C. Horner, Dartmouth College A. B.; Faculte des Lettres, Strasbourg, France; New York University School of Law J. D.; Member, New York Bar.

Didier Legrez, Licencie es Lettres; Diploce d'etudes superieures de droit prive; Avocat a la Cour d'Appel de Paris.

states.

(Result of vote: FOR—19 votes, AGAINST—4 votes. ABSTENTIONS—2. STATES VOTING FOR: Germany, Austria, Belgium, Brazil, Denmark, Spain, Estonia, France, Greece, Italy, Japan, Luxembourg, Mexico, Netherlands, Poland, Switzerland, Czechoslovakia, Yugoslavia. STATES VOTING AGAINST: Egypt, Great Britain,

Union of South Africa, Australia. ABSTENTIONS: Norway, USSR.)

THE PRESIDENT: The French proposal is thus accepted by 19 votes against 4, and two abstentions.

We pass now to the third heading: Limits of Liability.

We are presented with a French amendment: reduction of the figure for goods. (Article 23, paragraph 2).

The amendment of the French Delegation is conceived thus: "the liability of the carrier shall be limited to the sum of 125,000 francs per traveler . . .".

Moreover, it is proposed to eliminate from paragraph 4 of the same article the sentence: "the values hereabove are gold values".

I give the floor to the Reporter.

MR. De VOS, Reporter: We reach the third subject, which concerns the limitation of liability, from another angle.

The French proposal consists in reducing the limit of liability for goods. Moreover, the French proposal consists in modifying, for passengers, the liability of the carrier, in converting the sum of 25,000 gold francs into the value of present French currency, that is to say, 125,000 francs. This proposal is the consequence of the stabilization of French currency which occurred since the text was prepared.

The same modification leads quite naturally to the elimination of the sentence "the values hereabove are gold values".

The consequence for goods, is that in maintaining the sum of 100 francs per kilo, which become 100 stabilized

French francs, one reduces the maximum value of the liability for goods.

The same observation has been made in my country and, as much as Reporter as Delegate of Belgium, I support this French proposal. I remind you that it consists in taking for goods, as limited liability, 100 French francs per kilo and for travelers 125,000 French francs.

MR. RIPERT (France): I do not have much to add to that which the Reporter has just said.

The requested modification is one of pure form. The text was drawn up before the French stabilization. It has been added: The above values are gold values.

As there is a new definition of the French franc, in order that the text be correct one must take the French franc, which is the gold franc, and multiply it by 5. It's a simple question of wording. This is for passengers.

But for goods, the air carriers have pointed out to us that the figure of 100 gold francs per kilo, previously fixed, that is to say, 500 French francs, was too high a figure in comparison to the average value of tonnage carried.

Here is the practical indication furnished by the air carriers. They say: There's a very clear way of fixing the average value of tonnage carried; the consignors having declared the value of the shipments, one need only divide the declared value by the tonnage carried. They specify: for example, in 1928 we carried 392,000 kilos and as declared value we had 50 million, this gives around 130 francs per kilo.

The value per kilogram would thus not exceed on the average 130 francs.

When we fixed the limit of liability, we took a figure which we considered as representing the average value of goods carried, that is 500 francs per kilo. This figure of 500 francs being too high, we propose to you to reduce it. The figure of 100 francs would be perhaps a little low, but one could take, for example, 150 francs or 200 francs, in choosing the figure which would be suggested to us by practical considerations.

MR. RICHTER (Germany): For Germany I believe that the reduction proposed by the French Delegation to 20 gold francs is excessive, but we could accept, following your suggestion, the sum of 250 French francs.

MR. PITTARD (Switzerland): I am not all all opposed to an actual estimate as regards liability for passengers and for goods, but the Swiss Delegation submitted a text which corresponds to that of the International Railroad Convention for the calculation of values.

Naturally, when we prepared our text, the French franc was variable, it has been stabilized since. But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law. For this reason, in Switzerland, we have preferred to stick to the gold standard, which is the same in all countries, since there is but one quality of gold.

We would not be opposed to refer to the French franc, but to the gold French franc, that is to say, based on a weight of gold at such and such one thousandth.

Naturally, one can say "French franc" but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, but let's take a gold value. I refer to the drafting committee to find a formula, but I would like the conference to be consulted on the opportunity to take a gold value as a basis of calculation, be it American or French.

Our proposal is the following, except for wording:

> The sums indicated hereabove shall be considered as corresponding to the gold franc worth 1/5.18 gold dollars of the United States of America. They must be converted in each national currency in round figures.

MR. RIPERT (France): The amendment of the Swiss Delegation cannot be applied here, because the definition of the gold franc, that it gives 1/5.18 gold dollars of the United States of America, is the definition of the former gold franc and not of the new gold franc. If this Convention of air law is to be applied during one or two centuries, I would perhaps share the fears of Mr. Pittard, but it's a question of a stabilization which was done in practically every country, for a Convention which is drawn for a few years, and I believe that when you will have fixed the present French franc, you will add nothing in saying "gold franc". What fear can you have? It is evident that the definition will correspond to the present franc.

MR. CLARKE (Great Britain): And if you have a new revaluation?

MR. RIPERT (France): The Convention applies to the present franc. There is a definition of the French franc in the French statutes of 1928; when we have put in the Convention: 250 French francs such as they are defined at the time the Convention comes into force, everything will be set. It's a question of wording.

THE PRESIDENT: Then, Sirs, if you have no opposition, we are going to proceed to a vote on the French proposals amended by the German Delegation.

MR. RIPERT (France): We ally ourselves with this last proposal.

MR. GIANNINI (Italy): There is first of all the question of principle: We must know if we are applying the principle of the French Delegation. Then there is the question of the French franc.

MR. PRESIDENT: That's true. Then, we are going to pass to a vote on the question of substance, that is, whether we accept the French formula or the Swiss formula.

MR. PITTARD (Switzerland): We have no objection to taking the French franc as a base, but what I stand against, is the fact of referring to a French law of 1928; insert in our international convention the same formula as that which you have in France and we accept it.

MR. RIPERT (France): Then, we shall insert "French franc corresponding to such and such a weight of gold".

MR. PITTARD (Switzerland): We agree.

MR. PRESIDENT: Sirs, the vote is open. The vote by states is not demanded.

I am going to ask the conference to come out in favor of the French formula, that is to say, the definition of value of French francs corresponding to a given weight of gold.

(Result of vote: FOR—18 votes, AGAINST—1 vote. STATES VOTING AGAINST: Italy.)

THE PRESIDENT: We pass to the second question, the question of the sum which would be fixed at 250 francs per kilo (for goods).

MR. GIANNINI (Italy): I don't know if I understood well, but I understood that we had voted for a definition of the franc, and not to know if we were accepting the reduction of the limited liability for goods. Now, we are going to vote on the principle of reduction, without fixing the exact figure?

THE PRESIDENT: We pass at the same time on the figure. The proposal consists, in sum, in reducing the ceiling figure of 100 gold francs to 50 gold francs.

MR. SUDRE, Secretary General: You have just indicated that you would accept the value of the present stabilized French franc for its gold value; this represents, not the 100 francs per kilo indicated by Article 23, but 500 francs, and you are presently presented with a proposal for reduction by the French Delegation, supported by the German Delegation, which suggests fixing the figure indicated in Article 23, paragraph 2, at 250 francs

per kilo, in French francs, such as you have just defined them.

THE PRESIDENT: No one demands the floor? . . . Then, we pass to a vote. The balloting is open. A vote by states was asked.

(Result of vote: The French proposal is adopted unanimously but for 2 abstentions, those of Japan and the USSR.)

THE PRESIDENT: Sirs, we pass to the fourth heading: The Liability Action. We begin by the letter (a).

EXHIBIT B—FOREIGN DECISION OF *ZAKOUPOLOS V. OLYMPIC AIRWAYS CORP.* ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

TRANSLATION

Athens Court of Appeal

No 256/1974

President: Con. Mermingas

Introducing Judge: Con. Sakellariades

Whereas in their action, whereon the appealed judgment was issued, as such action was acceptably clarified by the first instance written pleadings, the plaintiffs and now appellees have stated that pursuant to an agreement of air transport, made the 22nd December 1971 in Western Germany with the defendant Olympic Airways, they delivered to it for transportation, by aircraft of its, from

western Germany to Athens, their luggage mentioned therein and that, due to the negligence of the defendant and its agents, workmen and employees a suitcase of theirs was lost during the transportation, weighing twenty kilograms, such loss having been declared on the same date to the defendant. On the grounds of such facts they requested that the defendant be obligated to pay them as compensation the sum of drachmas 30.696, corresponding to the value of the articles contained in their suitcase, which was lost due to its fault, mentioned in the action in detail. The court which judged at the first instance, applying the Warsaw Convention, ratified by Emergency Law 596/1937 accepted the action in part and adjudicated to the plaintiffs the sum of 18.970 drachmas.

Whereas in paragraph 2 of article 22 of the Warsaw Convention ratified by E. L. 596/1937, as same was amended by Legislative Decree 4376/1964, it is provided that "in the transportation of checked luggage and of goods the liability of the air-carrier is limited to the sum of 250 francs per kilogram". And in paragraph 5 of the same article is provided that: "The sums provided in this article are considered to refer to a monetary unit weighing sixty-five and a half milligrams of gold of nine hundred thousandths fineness. These sums may converted into national currencies, the fractions being omitted the conversion of such sums into national currencies, except the golden ones, will be made in case of court proceedings, pursuant to the value of such currencies in gold on the date of issuance of the judgment." As basis for the conversion of the above francs into drachmas is taken the value of gold, which, as it is known has two values.

One that is steady and irrevocable and which is determined internationally and in Greece in a certain quantity of United States of America dollars per ounce of pure gold, and one that its current value in drachmas and which is determined formally in the Athens Stock Exchange, according to article 1 para 2 of E. L. 944/1946, under which "the purchase and sale of gold and golden coins is permitted in the Athens Exchange." Between those two values said E. L. 596/1937, as amended, accepts the current value thereof, because pursuant to the above article 22 para. 5 of the Warsaw Convention, in case of court proceedings the value of gold on the date of issuance of the adjudicating judgment will be taken into account. Consequently the law clearly accepts as basis for the conversion of the said francs into drachmas the current and market value of gold in the Athens Stock Exchange from time to time prevailing, because otherwise, if the steady thereof was taken into account, the occasion of a different calculation of the gold's price on the date of the judgment's issuance would never arise since gold's value would be steady and unchanged. Finally according to article 917 of Code of Civil Procedure, whenever the consideration consists of replaceable commodities for enforcement reasons their value in money must be determined. The determination of consideration's value is made by a judgment of the one member first instance, following the procedure of articles 670 to 676. In view, therefore of all the above, as well as of the fact that the suitcase belonging to the plaintiffs-appellees which was lost at the transportation from Dusseldorf, western Germany to Athens, by a aircraft of the defendant-appellant, was weighing, under the facts mutually accepted, of

twenty kilograms, and in the basis of such weight the defendant is obliged to pay to the plaintiffs five thousand (5.000) of the above monetary unit (francs), the value thereof being calculated at the time of the first hearing of the action under consideration at the first instance (5 October 1972), as such parity was taken into consideration from the time point of view by the appealed judgment as well and not at the time of issuance hereof, since the Court of Appeal may not issue a more harmful judgment for the appellant without the submission of an appeal or a counter-appeal by the appellees-defendant (art. 536 para. 1 Code of Civil Procedure), and the place of the appellant is in this case rendered more harmful by such at a later time determination of gold's value, it being an evident to all fact that as from the above date (5 Oct. 1972) and thereafter has substantially increased the current value of gold, which, as aforesaid, is the basis of determination of the franc's price. Such calculation will be made on the basis of the current price of gold prevailing in the Athens Stock Exchange on the above date. Consequently the appealed judgment correctly accepted that the value of francs should be calculated at the current and market value of gold, but wrongly and by an erroneous interpretation of law condemned the defendant-appellant to pay drachmas, and therefore such judgment must be in fact rescinded and the appeal under consideration must in this part only be accepted, so that, the action under consideration being judged a new by the Court of Appeal and being accepted in part, the defendant-appellant should be obligated to pay to the plaintiffs the equivalent in drachmas of the above amount of francs at the time aforesaid (5 Oct. 1972).

THEREFORE

It obliges the defendant-appellant, for the case set part in the action and the reasoning hereof to pay proportionately to the plaintiffs the equivalent in drachmas of five thousand francs (5.000) at the time of the first hearing of the case at the first instance (5 October 1972), in accordance with the calculation set part in the reasoning, with the lawful interest as from the service of the action till payment in full.

EXHIBIT C—FOREIGN DECISION OF *FLORENCIA, CIA. ARGENTINA DE SEGUROS S.A. V. VARIG S.A.* ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

CERTIFICATE OF ACCURACY

TRANSLATION
From Spanish into English

STATE OF NEW YORK
COUNTY OF NEW YORK
s.s.:

On this day personally appeared before me Wm. Bertsche, J.D., Ch.E., A.C.S. who, after being duly sworn, deposes and states:

That he is a translator of the Spanish and English languages by profession and as such connected with the LAWYERS' & MERCHANTS' TRANSLATION BUREAU;

That he is thoroughly conversant with these languages and is duly accredited by examination as translator

of said foreign language by the American Translators Association.

That he has carefully made the attached translation (on the official paper of the LAWYERS' & MERCHANTS' TRANSLATION BUREAU) from the original document written in the Spanish language; and

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

/s/ (Illegible)

(Jurat dated April 28, 1981 omitted in printing)

In Buenos Aires, capital of the Argentine Republic, on this 27th day of August 1976 there met, by agreement, the judges of Part 2 for Civil and Commercial Matters of the National Court of Appeals in Federal and Administrative Contentious Matters to take cognizance of the appeal filed in the action of "Florencia Cia. Argentina de Seguros v. Varig S.A." for collection of money, from its judgment appearing on page 107, the Lower Court having submitted the following question for decision:

Is the decision appealed from in accordance with the law?

The drawing of lots having been effected, it turned out that the voting was to be effected in the following order: Justices Guillermo R. Quintana Teran and Eduardo Vocos Conesa.

With regard to the question submitted, Judge *Dr. Guillermo Quintana Teran* stated:

I. The air carrier having admitted its liability for the loss of a package of 32 kilograms containing six Hi-

tachi transistor conductors which was to travel on flight RG-315/31 from Tokyo to Buenos Aires, the discussion is centered specifically on the amount of the claim, since the plaintiff considers the manner of calculating the limit of liability stipulated in Article 22 of the Warsaw Convention of 1929 erroneous. The court, on the other hand, held that the calculations effected by the defendant were correct, for which reason it limited the judgment to the amount already deposited by it and exempted it from the payment of interest and costs.

The plaintiff has appealed from said decision, its grounds of appeal being set forth in the brief appearing on pages 121/123, the answer to which appears on pages 125/127.

II. Article 22 of the Warsaw Convention limits the liability of the carrier of baggage and goods to 250 "Poincare" francs per kilogram. The "Poincare" franc is a theoretical currency of 65.5 mg gold of 900 thousandths fine, which represents 0.5895 grams fine gold (in accordance with report appearing on pages 37, 88, 69 and 92/3). In order to determine its value one starts from the quotation of the Troy ounce (which is equivalent to 31.10348074 grams of fine gold), which was stable for a long time (see A. J. Mendelsohn, The Value of the Poincare Gold Franc in Limitation of Liability Conventions, in "Journal of Maritime Law and Commerce" Vol. 5, No. 1, pages 125/128). Today, however, it is based on the value established by the Federal Reserve Bank of the United States (US$ 42.22 (see report on page 87) or the parity with the SDR (Special Drawing Right). Article XXC, Section 2 of the Agreement Establishing the International Monetary Fund determines that 0.888 671 g of fine gold

is equivalent to 1 SDR = 20188 dollars, namely that the Troy ounce of fine gold represented US$ 42.0658. With respect to all of this, see report of the Central Bank appearing on page 90, there is a free gold quotation market, there being contained in the records, various circumstances concerning the quotation of the gold, there being contained in the records various certificates concerning the quotation thereof on the markets of London, Paris and Zurich (see pages 48, 52, 56, 60, 68 and 70). (sic)

What is involved then is to define whether the value of the Poincare franc is to be established as a function of the quotation established in the United States of America in order to stabilize the international exchange parities or as a function of the true value of gold, established on the free exchange markets by the law of supply and demand (see report on page 52).

This constitutes—with respect at least to the national decided cases—a novel question. The Warsaw Convention does not expressly define the point; it appears to us proper to interpret it in the manner that the limit of liability established seeks to approximate as accurately as possible the true value of gold (see P. P. Heller, "The Warsaw Convention and the Two Tier Gold Market," cited by A. I. Mendelsohn). This manner of looking at the problem appears particularly suitable if it is borne in mind that the international legislature desired to have reference to an ideal currency which is defined only by its metallic content, which, in view of its intrinsic character—gold—, permanently retains its value.

By way of corroboration it may be recalled that when different rates of exchange have existed—as is the case

on the commercial and financial markets—the decided cases have tended towards what reflects with greater reality and/or veracity the parity of our currency with the foreign exchanges (cf. Cam. Civ. Cap., Sala A, J.A., volume 15, year 1972, page 207; Sala A., J.A., volume 17, year 1973, page 48; Cam. Com. Cap., Sala C, J.A., volume 19, year 1973, page 358, etc.).

I do not believe that in order to alter the sense of this decision it is possible to invoke the existence of contrary uses and customs since the reports on pages 87/89 which come from companies directly involved in the matter do not demonstrate their validity with the characteristics required by the legal writers (see Llambias, "Tratado de Derecho Civil" (Treatise on Civil Law), General Part, 4th edition, volume I, pages 68/69, No. 65/66; Borda, "Tratado de Derecho Civil argentino" (Treatise on Argentine Civil Law), General Part, 5th edition, volume I, pages 70/71, No. 54), the airline companies limiting themselves to submitting those which are in accord with the view most favorable to their own interests.

Finally, I wish to point out that the Central Bank of the Argentine Republic, when calculating the value of the Argentine gold in its report appearing on page 61 of the records, employed the estimate of the Troy ounce on the free market and not the "official" quotation.

There still must be defined the date which must be taken into account for the purposes of effecting the conversion of the Poincare francs. I believe that such date must be the date of the breach of the transportation contract—since the carrier's obligation to indemnify arises at that moment—which, in the present case coincides with

the date of arrival in Buenos Aires of flight H6-5A5/31 of Varig to Buenos Aires without the cargo covered by air waybill 042-14116933.

The plaintiff having proven the payment to the consignee of the merchandise of Pesos 30,000 (see report appearing on page 4 of the records and acknowledgement at the end of page 37 of the records) and there being no question concerning the value thereof and the liability of the carrier—the questions which the defendant submits being related to the limit of liability—I believe that the complaint must be granted in its entirety, including that part thereof relating to the calculation of the monetary depreciation, but with the condition that its amount does not exceed the limit of 250 Poincare francs per kilogram of weight stipulated in Article 22 of the Warsaw Convention, which is to be calculated duly in accordance with the rules which have just been set forth.

This court has repeatedly admitted in the field of civil liability for breach of contract, inclusion of monetary depreciation, even in cases in which the action was brought by an insurance company subrogated in the rights of the injured party. Under this last aspect it is true that the court, as from action 3397 decided on November 20, 1974, has, with my single dissent, which it upheld in that case and in many others changed its previous holding, inclining to the opinion which denied this right to the insurance companies; however, in its present integration it has returned to its original opinion (see actions 4415 of July 20, 1976, and 4377 of July 23, 1976).

Taking into account the time which has elapsed since the payment contained on page 4 was made, the plaintiff

lacks the right to obtain updating for prior periods since it does not appear that it itself paid this "plus" to the injured party (see decision of this court in action No. 1576 handed down on November 23, 1979), the variable course shown during this period of time by the phenomenon of the loss of the exchange value of our currency, and the circumstance that the amount ordered to be paid will bear interest at a reduced rate from the date of this pronouncement, I believe that the amount ordered for payment must be increased to the amount of 168,000 pesos.

(Omission)

Revista de Estudios Maritimos, January-May 1977, p. 85.

EXHIBIT D--FOREIGN DECISION OF *BALKAN BULGARIAN AIR LINES V. TAMMARO* ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

I, Federico Garcia-Almendros, Managing Director of Expression Translations Limited, 188/9 Drury Lane, London WC2, hereby declare that the enclosed translation into the English language is a true and faithful rendering of the Italian original documents likewise hereonto attached.

11th June 1981

EXPRESSION TRANSLATIONS LIMITED
/s/ F. Garcia
(Managing Director)

ITALIAN JURISPRUDENCE

Balkan Bulgarian Airlines v. Tammaro

Court of Milan 25.10.1976

COURT OF MILAN 25 OCTOBER 1976

Orazi, Pres.—D'Agostino, Reporting Judge

BALKAN BULGARIAN AIRLINES v. TAMMARO

Transport—air transport—transport of persons and baggage—Warsaw Convention 1929—field of application—its autonomy in relation to the Shipping Code and Civil Code.

Transport—air transport—limitation of debt—exclusion for fraud or serious fault on part of carrier.

Transport—air transport—compensation for damage—criteria for conversion into national currency of the sum in Poincare francs.

At the end of the Milan-Frankfurt-Sofia flight effected by the Balkan Bulgarian Airlines on 14th August 1971, a

passenger had not obtained redelivery of the baggage and only subsequently obtained possession of one of the two cases. The passenger then summoned the Airline before the Courts of Milan, claiming compensation for the damages set at the figure of 283,000 Lire.

By a judgment dated 26th July 1973, the Honorary Magistrate accepted the claim for complete compensation, not recognizing the right of the Defendant to the benefit of limitation of the debt.

The uniform international regulations of the Warsaw Convention of 12th October 1929 (modified by the Hague Protocol of 28th September 1955) is completely autonomous and self-sufficient in relation to the evaluations contained on similar matters in the rules of the lex fori. Since it was a matter of international air transport, no reference should therefore be made to the provisions of the Navigation Code and the Civil Code (1).

The limitation of the debt to 250 Poincare gold francs per kilogramme provided for in Article 22 sub-section 2 of the Convention is excluded only where the passenger proves that the loss of the baggage is due to fraud or serious fault on the part of the carrier (2).

The conversion into national currency of the sum in Poincare gold francs (1 gold franc = 655 milligrammes of gold at 900/1000) to be made—in pursuance of the convention—in accordance with the gold value of the currency at the date of decision, must be effected with reference to the quotation of gold on the principal European markets (London and Zurich) (3).

Since, in fact, the objective responsibility of the carrier (and which the carrier invokes) has been established—as

mentioned above—is 250 francs per kilogramme, and since the currency unit of account is assimilated by Article 22, sub-section 5 of the said Convention to 65 milligrammes and a half of gold at a purity of 9 thousandths fine (i. e. Poincare francs) it follows that 250 of the said francs are equivalent to 16.375 grammes of gold at 900/000 and that in turn, these are equivalent to 14.7375 grammes of gold at 1000/000 (16.375—1/10 = 14.7375).

The subsequent conversion of the sum indicated into national currency is then effected, again in accordance with Article 22 sub-section 5 of the said Convention, on the basis of the gold value of the currency at the date of the decision.

Therefore, in order to carry out the calculation in question, the Court deems that it should make reference to the quotation of gold on the principal European markets (London and Zurich) which quotation at today's date of discussion proves to have been fixed at an average of US Dollars 127.50 per troy ounce.

Bearing in mind the fact that the troy ounce is a measure equivalent to 31.1035 grammes, 14.7375 grammes therefore amount to US Dollars 60.41.

At that point, considering that today's rate of exchange for the dollar (UIC average) is 879.95 lire, and considering furthermore that the weight of the case lost must be presumed—failing more precise indications in the records of the case in relation to the overall weight of 20 kilogrammes of the 2 baggages belonging to Tammaro—to be 10 kilogrammes, it is quite clear that the amount in lire from the indemnity due to the respondents in appeal, amply exceeds the sum which the first Judge ordered the

airline to pay and accordingly there is no concrete and actual interest on the part of the Appeliant in the amendment of the Decision.

(Omissis)

EXHIBIT E—FOREIGN DECISION OF
KUWAIT AIRWAYS CORP. V. SANGHI
ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

TITLE SHEET FOR JUDGMENTS IN APPEALS
IN THE COURT OF THE PRINCIPAL
CIVIL JUDGE

AT CIVIL STATION BANGALORE

present: Shri S. M. Byadgi, B. Com. LL.B.,
(Name of the Presiding Judge)

Date of Judgment: 11th day of August 1978.

Regular Appeal No. 54 of 1977

Appellants: 1. Kuwait Airways Corporation,
having its Indian Office at 86, Veer Nariman Road, Bombay-28

2. F. A. Moraes,
S/o Cyprian, Christian,
Officer, Kuwait Airways Corporation,
86, Veer Nariman Road, Bombay-28; and
86, Veer Nariman R.

3. S. E. I. Joseph Khouri,
General Manager,
Kuwait Airways Corporation,
86, Veer Nariman Road, Bombay-28

By Pleader Shri W. K. Sundara Murthy

Vs.

Respondent: Dr. Indra Sanghi,
Sanghi Associates,

400N, First Block, Rajajinagar, Bangalor —560-010

By Pleader Shri

Date and nature of the decree or order appealed against—

Appeal against the judgment and decree of the Principal Munsiff, Civil Station, Bangalore in O. S., No. 525/73 dt. 22, 4.77.

Date of the Institution of the appeal: 29.6.1977

Duration of the Appeal	Year's	Month's	Day's
	1	1	12

REGULAR APPEAL NO. 54/1977

JUDGMENT

The only point that arises for consideration in this appeal is, what is the amount of damages to be paid to the respondent? The Respondent who was a bonafide traveller in the appellant Airways from Bombay to London on 29-10-1972 lost his luggage in the middle of his journey. His efforts to get back his luggage was futile in spite of his several correspondence. Thus, he claimed a damage of Rs. 2150/- and Rs. 100/-towards his expenditure in Franc. Besides he also claimed a damage of Rs. 2000/-on account of his physical suffering and mental torture. Thus, he claimed Rs. 7900.15 paise of damages. By way of amendment, he has claimed that the amount of Ps. 7900/- cannot be paid in terms of rupee then the said value may be paid in terms of gold.

2. The appellant-defendant raised several contentions by filing its written statement. They contended that the court below has no jurisdiction to entertain this suit. They denied their liability to pay the suit claim as claimed

by the Plaintiff. They contended that they were entitled to pay only damages to the extent of 10 kgs. and the value of its would be more or less than what is claimed by the plaintiff.

3. On the basis of these pleadings, the necessary issues were framed and the learned Munsiff after recording the oral evidence examining the various documents produced in the case found that it value of the articles that was lost by the plaintiff comes to Rs. 8783.55 paise as per the provisions of Warsaw Convention. He disallowed all other claims claimed by the plaintiff and according passed a decree for Rs. 8783.55 paise by a judgment dated 22.4.1977. Being aggrieved by the said judgment and decree, the defendant—Airways has come up with this appeal.

4. In support of this appeal, Sri Sundara Murthy, the learned Advocate for the appellant pressed only one point for consideration. He contended that Rule 22 (5) of the second schedule refers to conversion into national currencies according to Gold value of the currencies.

Hence, the Court below ought to have held that the conversion is to be made according to official value of the gold and not according to the fluctuating market rate. He further submitted that the Official value of the gold is to be fixed at part to the value of the gold that is fixed by the International Monetary Fund. So, he has given certain calculation as to how the said price is to be fixed and according to the said calculation he submitted that the price of the luggage that is lost by the respondent comes to only Rs. 1243.78 paise.

5. It is fairly conceded that the court below has jurisdiction to try this suit. It is also conceded that the respondent-appellant lost his luggage on his way to London by the negligence of the appellant Airways. It is also conceded that the respondent is entitled for compensation as per the Second Schedule of Warsaw Convention. It is further conceded that the respondent is entitled to get a compensation for a sum of 250 Franc per Kilogram as his luggage was registered. The appellant Airways also in their correspondence produced in the case have offered to pay the value of the said luggage. Rule 22 (5) of the Second Schedule clearly lays down as—

> "The sums mentioned in France in this rule shall be deemed to refer to a currency unit consisting of Sixty-five and a half milligrammes of gold of millestimal finess nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings be made according to the gold value of such currencies at the date of the judgment."

Thus, it is clear that the value of the luggage that is lost is to be paid according to the gold value in terms of rupees prevailing in our country. Similarly, Rule 22 (4) of First Schedule reads as follows:—

> "The sums mentioned in this rule shall be deemed to refer to the French Franc consisting of sixty-five and half milligrams gold of millesimal fineness nine hundred."

Thus it is clair that a Franc consists of sixty-five and half milligrams gold of millesimal fineness nine hundred. The learned Munsiff by taking into consideration the market value of the gold prevailing at the time of his

judgment at the rate of Rs. five ninety-six per 10 grams. has awarded a compensation at the rate of Rs. 8783.55 paise. He has taken the gold value as per the bullion price published in Deccan Herald dated 21.3.1977. Shri Sundara Murthy, the learned Advocate appearing for the appellant placed his reliance on a decision of the Supreme Court, reported in A.I.R. 1969 S. C. Page 1201, that a news item without any further proof is of no value and it is a second hand secondary evidence. It may be noted here that the item published in this paper produced at EM.P.26 it is not the news item published by the Deccan Herald itself. But it is a regular bullion price published under the authority of the bullion market. Therefore, one cannot believe that the principle laid down in the aforesaid decision would be of any help to the appellant.

6. Shri Sundara Murthy next contended that the price of this gold cannot be taken into consideration at any rate as per the market value. But it will have to be considered in par with the gold value fixed by I.M.F. Unfortunately, there is absolutely nothing in this first or second schedule which is enumerated from Warsaw Convention, to say that the price of the luggage is to be fixed only at par value of the gold determined by I.M.F. However, Shri Sundara Murthy placed his reliance on the Exchange Control Manual published by the Reserve Bank of India. He particularly refers to Article 35 of this Manual. A perusal of the same clearly goes to show that it applies to the Contracts entered into by the Importers for purchase of goods from countries with which Government of India have concluded rupees payment agreement. Such an agreement may also contain a gold clause and the price specified in a contract is based on the current par

value of the Indian rupee as defined in Article IV (1) of the Articles of Agreement of I.M F. i.e. one rupee = 0.118489 grams. So one cannot say that by plain reading of this Article it would apply to such case where the value of the luggage that is lost is to be fixed at the par value of the Gold rate fixed by I.M.F. It may be seen—that all these convention regulations were embodied in an Act shown as the Carriage by —Air Act 1972. The said Act—has enumerated the entire rules of the Convention—from Section 6 of the said Act. It is clear that a Franc mentioned in Rule 22 of the First or second schedule shall be for the purpose of any action against a carrier be converted into rupees at the rate of exchange prevailing on the date of which the amount of damages to be paid by the Carrier is ascertained by the Court. So, by this provision, the conversion is made quite easy and it clearly says that it is to be converted into rupee at the rate of exchange prevailing at the relevant time. If that is taken into consideration then the value of the luggage that is lost by the respondent comes to Rs. 10,000/- If in fact, the Government has an idea to fix the gold value on par with the gold value of I.M.F. then there would have been a provision for the same in the subsequent enactment of 1972. Hence, the Article that is relied by Sri Sundara Murthy in this Exchange Control Manual of 1971 would be of no assistance to him. Therefore, I find no substance in this contention.

7. It is next contended by Sri Sundara Murthy that the lower court has awarded damages more than what is needed by the Plaintiff. It is no doubt true that the Plaintiff in his complaint has claimed damages for the loss of his luggage to the extent of Rs. 2150/- S.F. he has not ex-

plained in his evidence what is the value of Rs. 2150/- S.F. But he has claimed Rs. 5844/- towards loss of the luggage. It is seen from various letters written by the appellant-corporation that he is entitled for 10 Kgs. equivalent to 250 gold Francs as stipulated in Article 22 of the said agreement and protocol provide Exs. P-9, P-12, P-14, P-20, P-22, P-24 and P-24. It may be noted that the respondent is expected to make a declaration before travelling about the contents of his luggage. It contained only his clothes and Cosmetics. The respondent is not expected to know its value in France. So what is claimed by the Plaintiff in his suit is only an approximate claim. The gold value of the Francs is to be determined by this court. Since, the appellant-Corporation has admitted to pay the value of 10 Kgs. of the luggage in Francs. The value of the same is determined by the lower court. The Plaintiff has also paid the necessary court-fee thereon. Hence, I find no reason to reject the claim of the Plaintiff to that extent.

8. It is no doubt true that the Respondent has filed an application under I.A.I. under order 41 Rule 3 C.P.C. requesting the court to direct the appellant to deposit or to furnish security to the decretal amount. That application is still pending. The learned Advocate for the Respondent submitted that the appellant should be directed to deposit the decretal amount or to furnish security. Under Order 41 Rule 3 C.P.C. a discretion is left to the Court to give such a direction. It may appear on the face of the records that this implication would be infructious by the following order. At the same time the appellant Corporation has its head office in a foreign country and in the interest of justice, it is necessary to bind it to pay the decretal amount. The appellant has not paid the amount even though the

Respondent has lost his luggage in the year 1972. Therefore, in the result, I find no reason to interefere in the judgement and decree passed by the lower court and as such the following order:

ORDER

a) For the reasons stated above, this appeal is hereby dismissed with costs;

b) The Appellant is hereby directed to deposit the decretal amount or to furnish proper security if in case he intends to prefer a second appeal.

Dictated to the Stenographer, transcribed by him, corrected by me and then pronounced in open court this the 11th day of August 1978.

Sd/- (S. M. Byadgi)
Principal Civil Judge,
Civil Station, Bangalore

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES, LIMITED, Plaintiffs,

v.

TRANS WORLD AIRLINES, INC., Defendant.

No. 81 Civ. 1700 (WK).

United States District Court, S. D. New York.

Nov. 6, 1981.

As Amended Dec. 18, 1981.

MEMORANDUM AND ORDER

WHITMAN KNAPP, District Judge.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin $544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at $250,000. The parties agree that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time

of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

> "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths [the so-called Poincare franc]. These sums may *be converted into any national currency* in round figures." (Emphasis added.)

Counsel for TWA, in an extraordinary lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has — arguably, at least — been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA —in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the

parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of $6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

OPINION AND JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 999—August Term, 1981
(Argued April 22, 1982 Decided September 28, 1982)
Docket No. 82-7012

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
McGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,

Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, utilizing the last official price of gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

JOHN R. FOSTER, New York, New York (Donald M. Waesche, Waesche, Scheinbaum & O'Regan, P.C., New York, New York, of counsel), *for Plaintiffs-Appellants Franklin Mint Corporation, Franklin Mint Limited, and McGregor Swire Air Services, Limited.*

JOHN N. ROMANS, New York, New York (Robert S. Lipton, Scott J. McKay Wolas, Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel) *for Defendant-Appellee Trans World Airlines, Inc.*

(Robert B. Hemley, Norman Williams, Gravel, Shea & Wright, Burlington, Vermont, of counsel) *for Amici-Curiae Jacques Roulin and Hugh Harley.*

WINTER, *Circuit Judge:*

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's liability under the Warsaw Convention ("Convention")[1] for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs $6,475.98. 525 F. Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's

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[1]The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March 1979, plaintiffs Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than $6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.[2] Because of the absence of a special declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of

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[2]Article 18 of the Convention reads:

> (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.
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> (2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.
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> (3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river

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which the passenger takes charge himself."[3] The various limits are stated in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine

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performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

[3]Article 22 of the Convention reads:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States Dollars, *e.g.*, the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While asknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that

this standard "has been . . . espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F. Supp. at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by the Congress. See note 11, *infra*, and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry

from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniformity of legal obligation given the expected international character of the industry. *See* A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); *see also Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) *and* CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the developed countries, notably the United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.[4]

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[4]In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs of $16,000. Lowenfeld and Mendelshon at 504-09. The United States un-

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Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in term of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. *See* Second International Conference on Private Aeronautical Law, Minutes, Octo-

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enthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never consented to the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of $50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of 1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to $75,000 on all flights into or out of the United States." *Reed v. Wiser*, 555 F. 2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to $100,000 at the then current exchange rate of $35 per ounce of gold." *Id.* at 1089 n.12. However, the United States has not ratified that protocol.

ber 4-12, 1929, Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 § (4).[3]

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as the unit of account posed no problem for United States or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at $35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, *see* Bretton Woods Agreements Act, ch.

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[3]There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a *currency unit* consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n.7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U. S. C. § 286 (1976)), it promised to maintain (and, of necessary, redeem) the value of United States dollars in terms of gold. For purposes of the Convention's limits on liability, therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.[6] From 1955, however, the United States faced a persistent balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.[7] To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately $24 billion to around $10 billion.[8]

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton

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[6] See P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

[7] *Id.* at 690-91.

[8] *Id.* at 691, Figure 36-1.

Woods[9]—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

In August 1971, the United States suspended its commitment to convert dollars for gold.[10] In May 1972, it devalued the dollar by raising the official price of gold to $38 per ounce. *See* Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972). In October 1973, yet another devaluation raised the price to $42.22 per ounce. *See* Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of

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[9]*See* Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

[10]*Id.* at 641; *supra* note 6, at 651.

1973 and the abolition of the official price of gold.[11] Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a daily fluctuating free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR was calculated in terms of gold.[12] With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January 1981, the basket was reduced to five currencies.[13] The Montreal Protocol was presented to the United States Senate in January 1977 but has not been approved.

Meanwhile parties to the Convention have utilized a variety of units of conversion. The record shows Sweden

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[11]In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of gold certificates. See 31 U.S.C. § 405(b). The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold. . . ." S. Rep. No. 1295, 94th Cong., 2d Sess. 18, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5966-67.

[12]Gold, *supra* note 10, at 345.

[13]Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1, 3 (1981).

and Britain have adopted SDR's for purposes of Warsaw.[14] Both a Netherlands court and the Civil Court of Rome reached the same result.[15] Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.[16] The United States District Court in the Southern District of Texas recently opted for the free market price of gold,[17] the standard utilized by an Indian court,[18] and a Greek court.[19] Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535

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[14]See Sweden's Carriage by Air Act (1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); *see also* the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

[15]*State of the Netherlands v. Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aerea Italiane* v. *Ricciole* (Rome Civil Court judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

[16]*See Chamie v. Egyptair* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

[17]*Boehringer Mannheim Diagnotecs, Inc. f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981).

[18]*Kuwait Airways Corp. v. Sanghi*, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71).

[19]*Zakoupolos v. Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54).

F. Supp. 833 (E. D. N. Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations on TWA's liability in this case ranging from less than $6,500 to over $400,000, each has been adopted as the proper unit of account by at least one party, or domestic tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last"

official price of gold is offered as a possible unit, "last" is really a euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of $42.22 per troy ounce was no longer recognized by the United States.[20] We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memorandum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard.[21] The inconsistency of the CAB position, however,

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[20]The sole remaining use of the last official price is in determining the value of gold in the form of gold certificates. See note 12, *supra*. That is not relevant to the issues here.

[21]CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

is starkly evident. It rejects SDR's because the Senate has not approved the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability.[22] The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The current French franc is similarly flawed. To enforce it would amount to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and foreign exchange as an international reserve asset."[23] "[M]ember central banks may exchange SDR's for other convertible currencies and, therefore, SDR balances are actually lines of credit against which

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[22]Appellant's reliance on dicta in our decision *Reed* v. *Wiser*, 555 F. 2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U. S. has not ratified.

[23]Ward, *supra* note 14, at 2.

reserves may be borrowed for use in central bank operations."[24] As noted above, methods of calculating SDR's have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U. S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the "dollar values of each currency component based on daily market exchange rates."[25]

Though the value of any one currency in terms of SDR's fluctuates from day to day, SDR fluctations are generally less extreme than fluctations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention's unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR's as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR's is only

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[24] *Id.*

[25] *Id.* at 3.

the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty advice and consent and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U. S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al. v. Braden*, 16 How. 635, 656-57 (1853). While federal courts are necessarily called

upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); *see also id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and advice and consent and ratification on the other. *See Baker v. Carr*, 369 U. S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been crossed.[25] *See, e. g., Goldwater v. Carter*, 444 U. S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty approval by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic

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[25]Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1887); *see also Terlinden* v. *Ames*, 184 U. S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney* v. *Robertson*, 124 U. S. at 195.

reality, plainly encompasses use of that price to convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.[27]

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CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U. S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. *Cf. Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 50 U. S. L. W. 4892 (U. S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the

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[27]The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

Docket Number
82-7012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANKLIN MINT CORPORATION, *et al.*,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

NOTICE OF MOTION

for Stay of Issuance of Mandate

Motion By:

CURTIS, MALLET-PREVOST, COLT & MOSLE
Robert S. Lipton, Esq.
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Has a request of opposing counsel for consent been refused? (X) Yes

Has service been effected? (X) Yes

Is oral argument desired? (X) No
(*Substantive motions only*)

Requested return date:
(*See Second Circuit Rule 27(b)*)

Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: (*Name and tel. no. of attorney in charge*)

WAESCHE, SHEINBAUM & O'REGAN, P.C.
John R. Foster, Esq.
(212) 227-3550

Brief statement of the relief requested: Order staying the issuance of mandate in this case pending the filing by defendant-appellee Trans World Airlines, Inc. ("TWA") of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion: Whether an order staying issuance of the mandate in this case should be entered since TWA expects and intends to make proper and timely application to the Supreme Court of the United States by a petition for writ of certiorari for review of certain aspects of the decision and judgment of this Court in this case.

Brief statement of the facts (with page references to the moving papers): The relevant factual background is set forth at paragraphs 2 and 3 of the Affidavit of John N. Romans, sworn to on December 6, 1982, and submitted in support of this motion.

Summary of the argument (with page references to the moving papers): Pursuant to the provisions of Section 2101(f), Title 28 U. S. C. and Rule 41(b) of the Federal Rules of Appellate Procedure, an order should be entered staying issuance of the mandate in this case on the ground that it is the *bona fide* intention of TWA to make proper application to the Supreme Court within the time allowed by law for a writ of certiorari. The grounds upon which TWA's petition for certiorari will be based are set forth at paragraph 5 of the Romans Affidavit mentioned above.

12/7/82

Date

ROBERT S. LIPTON

The name signed must be printed beneath

Robert S. Lipton

Attorney for Defendant-Appellee.

ORDER

IT IS HEREBY ORDERED

that the motion be and it hereby
is *granted*

JAMES L. OAKES

Hon. James L. Oakes

RICHARD J. CARDAMONE

Hon. Richard J. Cardamone

RALPH K. WINTER

Hon. Ralph K. Winter

December 17, 1982